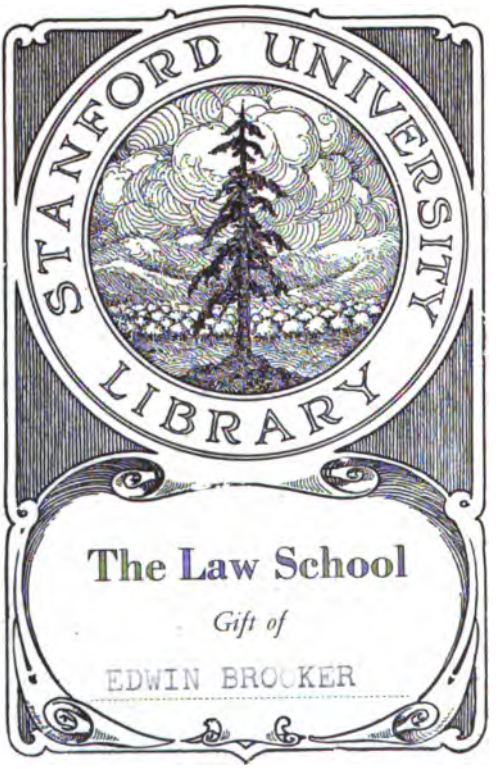
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EQUITY

AN ANALYSIS AND DISCUSSION OF MODERN EQUITY PROBLEMS

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To

ROSCOE POUND

AND THE MEMORY OF

JAMES BARR AMES.

PREFACE

The main purpose of the following pages is to present, analyze and discuss various equity problems. For this reason no space has been used in accumulating authorities. It is believed that the increasing number of decided cases will sooner or later require that more attention be given to the discussion of principles.

The author wishes to acknowledge his special indebtedness to the Harvard Law School class room lectures of Professor Ames in 1902-4 and of Professor Pound in 1912-13; to the collections of cases on equity subjects by Professors Keener, Ames, Scott and Boke; and to the articles and notes in the law reviews of Harvard, Columbia, Michigan and Yale.

Parts of the book have already appeared, in substance, in the December, 1917, numbers of the Harvard, Columbia and Michigan law reviews and are used here by the permission of the publishers of those reviews.

University of Missouri.

May 28, 1919.

G. L. C.

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EQUITY

CHAPTER I

INTRODUCTION.

A. BRIEF HISTORY OF EQUITY.

§ 1. Equity as a stage in our legal development.[1]

The law of every country in the civilized world is based either on the Roman Law or on the English Common Law. Each of these systems shows, roughly speaking, four stages of development, equity being the third. In the first stage of archaic law, the state is so weak that it does not undertake to work out justice; it merely tries to keep the peace by buying off the injured party and thus satisfying his desire for revenge. In the second stage of strict law, the state does

1. Lack of space forbids anything but the merest outline of the historical development. See Kerley's Historical Sketch of the Jurisdiction of the Court of Chancery and the Introduction to Adams' Equity. See also 27 Harv. Law Rev. 195-234, The End of Law, by Roscoe Pound; 16 Col. Law Rev. 87-98, The Origin of English Equity, by George Burton Adams; 13 Col. Law Rev. 696-713, Justice According to Law, by Roscoe Pound; 13 Mich. Law Rev. 293-301, The Early History of Equity, by W. S. Holdsworth; 11 Mich. Law Rev. 537-571, Relations between Law and Equity, by Wesley N. Hohfeld; 3 Amer. Law School Rev. 172-182, The Place of Equity in our Legal System, by Henry Schofield; 25 Yale Law J. 42-57, A Glance at Equity, by Robert L. Munger; 21 Yale Law J. 58-71, Confusion of Law and Equity, by H. H. Ingersoll; and 26 Yale Law J. 1-23, Relation of Equity Administered by the Common Law Judges to the Equity Administered by the Chancellor, by W. S. Holdsworth.

undertake to do justice by giving legal remedies to the injured party. In this period the law consists of rules for getting into court; these rules needed to be certain in order to avoid dispute and thus to suppress self help, because men were still much more inclined to use their fists than their reasoning powers. The emphasis during this period was thus upon remedies; while there was an attempt to work out justice, the attempt was a very crude one from our modern point of view because of the importance of certainty. As men's sense of justice developed, such an unmoral, formal system became inadequate. This brought about the third stage known in our system as equity and in the Roman Law system as natural law. This was a period in which morals were infused into the law. The emphasis came to be laid not upon remedies but upon duties and the aim of the legal system was to reach an ethical solution of controversies. In the fourth stage of the maturity of law, equity became more or less completely merged into the legal system. This merger took place completely in the Roman Law but in our system the process is still going on. The emphasis in this period is not upon remedies or duties but upon rights.

§ 2. Development of Roman and English law contrasted.

As we have just seen, both the Roman Law and the English Common Law systems passed through the stage of equity or morals infusion. But there was one important difference: in Roman Law this was done by the regular magistrates, while in the English system it was done by a separate court. It is largely an accident of history that it was so. If the judges of the common law courts of the sixteenth century had been sufficiently strong, broadminded men we might have had the common law moralized without the necessity for a separate court.

§ 3. The English courts before Equity.

Before the Norman Conquest of England in 1068 justice was administrated in England chiefly in people's courts and the law enforced was in the strictest sense unwritten; i. e. it was handed down by oral tradition. After the Conquest the king gradually established a system of royal or King's courts which eventually all but crowded out the Anglo-Saxon courts. The theory of the King's courts was that the king was the fountain head of all justice and the judges acted as his agents. This was not only theory but fact, and it was not till several centuries later that the independence of the English judiciary became established.

Purely traditionary law, being administered by the people themselves, does not need to be justified to the people. But the law as administered by judges who are set over the people must be thus justified. The judge must give his reason or basis for his decision. In the Roman Law there were statutes—the Twelve Tables—upon which to rest decisions, but in English law there being no such early statutes, the habit grew up of deciding according to the decisions of previous cases and in the absence of such precedents, according to a judicial reasoning which itself became traditional. This habit of adhering to precedent became so firmly fixed that when it became necessary to relieve against this formal and rigid system in order to meet the demands of a later and more complex civilization, the common law judges were not equal to the task and the work fell into other hands.

§ 4. The English court of chancery or equity.

The English king was in theory and fact the fountain of justice If justice could not be procured in the common law courts, the disappointed party might be able to get justice by appealing directly to the king. The king usually was not skilled in law, and he would naturally turn to some one of his advisers who

was. The adviser to whom were entrusted these appeals for justice outside the common law courts was the king's secretary or chancellor. These early chancellors were clergymen, not learned in the common law, but in the Roman and canon or church law. It was quite natural, therefore, that when the king through his chancellor gave relief it was done on ethical grounds. Gradually the business of relieving from the inadequacies of the common law system became so great that the chancellor came to have a separate court, which became known as the court of chancery or equity. In this country the terms chancery and chancellor have been used in only a few jurisdictions.

§ 5. The defects in the common law.

As already stated, it was the formalism and conservatism of the common law which led to the establishment of the court of chancery. These defects may be more particularly classified as follows:

1. The rigidity of the common law. For example, the common law judges failed to give any remedy against a trustee except in certain simple cases, and trusts thus became an almost exclusively equity subject. Another example of rigidity was that the judgment of a common law court was absolute, either for the plaintiff or for the defendant; the decree of a court of equity on the other hand, may be conditional.

2. The negative nature of the law. The common law courts could not, or at least would not command the parties, except in the extraordinary remedy of mandamus. The only command given was that to the sheriff, either to turn over to the plaintiff some specific property hitherto in the possession of the defendant, or to take and sell enough of the property of either party to satisfy the money judgment of the court. The power to command the defendant is one of the distinguishing features of a court of equity.

3. The common law can deal only with a two-sided case; equity can deal with any number of sides,

settling the rights of all the parties against each other. A good illustration is the power of a court of equity in winding up a partnership determining in one suit the rights of the individual creditors and the partnership creditors against the firm and the rights of the members of the firm against each other. It is one of the aims of equity to prevent, where feasible, a multiplicity of suits.

4. The exclusively contentions nature of the law. A law court will only deal with the case of an infringed right; it waits till the harm is done and then redresses the wrong. A court of equity exercises a preventive jurisdiction and will enjoin the threatened injury. A good illustration of this is an injunction given to a landlord against a tenant's cutting down valuable trees; the common law court would be compelled to wait till they were cut down and give merely a money judgment by way of redress.

§ 6. Administration of equity.

In England the court of Chancery existed as a separate court down to the Judicature Act of 1873, when all the courts of England were consolidated into one court and each division of it was clothed with both law and equity powers.[1] In this country there are now, roughly speaking, three ways of administering equity.[2] The first method is by having a separate court of equity; this is, of course, similar to the English method before 1873. This method exists in Alabama, Delaware, Mississippi, New Jersey, Tennessee, and Vermont. By the second method of administration equity and law are administered by the same courts, but the procedure is kept distinct. This method is followed in Florida, Illinois, Maine, Maryland, Massa-

1. See "The Operation of the Reformed Equity Procedure in England," 26 Harv. Law Rev. 99-107.

2. For a brief history of the changes of administration in many of the jurisdictions see 16 Cyc. 24-27.

chusetts, Michigan, New Hampshire, Pennsylvania, Rhode Island, Texas, Virginia, West Virginia, and in the Federal courts.[3] In all other jurisdictions, following the lead of New York, codes of procedure have been adopted, which purport to abolish the distinction between law and equity procedure; under these codes, however, it has been generally held that essential distinctions between legal and equitable rights and remedies still exist.

B. Limits and Nature of Equity Jurisdiction.

§ 7. Possibilities of equity jurisdiction.

As has been already pointed out,[1] after the Norman Conquest of England, the king was considered to be the fountain head of justice; the common law judges were his agents but with only a limited authority to hear and adjudicate certain specified causes of action. But the early chancellors represented the king directly. The king's jurisdiction was limited only by the boundaries of England; all persons and property within his dominions were subject to it; there was no reason in the nature of things why the chancellors, to whom was delegated this power of the king, should not have had a complete and universal jurisdiction. But in so far as the common law courts gave completely adequate relief, there was no justifiable occasion for interference; besides, an attempt to exercise such a broad jurisdiction would have brought them into serious conflict with the common law courts. Very early, therefore, some limitations were set upon the exercise of their jurisdiction, some of which have become so rigid that they are generally considered limitations upon the very existence of jurisdiction.

3. See "One Year under the New Federal Equity Rules of 1913," 27 Harv. Law Rev. 629-639.

1. See *ante* § 3.

§ 8. Limitations on the existence of equity jurisdiction.

Altho courts of equity are accustomed to say that a court of equity does not have jurisdiction in such and such a case, most of these limitations are restrictions only upon the exercise of their jurisdiction and not upon its existence; that is to say, they are limitations which courts of equity are at liberty to disregard if in their discretion they deem it wise and expedient to do so. There is one limitation, however, which probably no court of equity at the present time feels at liberty to disregard, viz., that equity will act only if it acquires jurisdiction over the person of each of the parties to the litigation—jurisdiction of the property involved not being enough.[1] This limitation is such a handicap that nearly everywhere statutes have been passed giving to courts of equity jurisdiction *in rem* in specified classes of cases. Two other restrictions, viz., that equity will not interfere if the common law remedy has always been plain, adequate, and complete, and that equity will not restrain crime or criminal proceedings, are frequently referred to as if they were limitations which were absolutely binding upon the equity courts. However, the fact that the restrictions are subject to some exceptions and modifications[2] tends to show that they are merely limitations upon the exercise and not upon the existence of equity jurisdiction.[3] These restrictions will be discussed more fully later.[4]

1. But see *post* § 361.

2. If a defendant wishes to object that the plaintiff had a plain and adequate remedy at law, he must do so at the earliest opportunity; and if he does not, the objection is waived; Brown v. Lake Superior Iron Co. (1890) 134 U. S. 530, 535. See 10 Col. Law Rev. 365; 7 *id.* 533; 27 Harv. Law Rev. 368 (acquiring jurisdiction by estoppel); 24 *id.* 239, discussing Forman v. Bostwick (1910) 139 N. Y. App. Div. 333.

3. A decree which violates these rules can not be questioned collaterally; Mellen v. Moline (1888) 131 U. S. 352, 367. Though of course it is subject to reversal if the objection was taken promptly but overruled.

4. See *post* §§ 244, 245.

§ 9. Equity acts in personam, not in rem.

The jurisdiction of a common law court may be based either upon its control over property or upon the fact that the defendant has been served with process or has voluntarily submitted himself to the court's jurisdiction.[1] The jurisdiction of an equity court is based, in the absence of a statute, upon the second ground alone, viz., getting control of the person.

Procedure in a common law court may be either *in personam,* ending in a personal judgment for damages, or it may be *in rem;* proceedings *in rem* are brought to recover the possession of property or to have a judicial declaration of a property right. Proceedings *in rem* are usually brought against a specific person or persons; in such a case the judgment is decisive only as to such person or persons. For example, if A sues B in replevin for a horse and gets judgment against B, this binds B but it does not prevent a stranger, X, from suing A in replevin for the horse and getting a judgment against A. But proceedings *in rem* may be brought against all the world; outside of admiralty[2] these are modern and statutory and are practically limited to the settling of title to land. In such a proceeding any one who has a claim may come in and assert it and hence every one is bound by the judgment. Proceedings and judgments may thus be said to be either (1) *in personam,* (2) *in rem,* binding only

1. The terms *in rem* and *in personam* are used not only to designate the two different kinds of jurisdiction but also in classifying rights, actions, judgments, and executions. As applied to jurisdiction the phrases mean "on" or "over" rather than "against" the property or person. In connection with executions, on the other hand, the phrases are used in their literal sense. The term "right *in rem*" is used to indicate a right which is available against people generally instead of against definite persons, the latter sort of right being called a right *in personam.* The phrases as applied to actions and judgments are sufficiently explained in the text. See also *post* § 280.

2. Such proceedings are common in admiralty law, which authorizes actions to be brought against a ship or cargo; these actions lead to judgments binding the interests of all persons in the property.

on particular individuals, or (3) *in rem* binding the whole world. Apart from statute the proceedings and judgment[3] in an equity court are *in personam* only.

Executions in a common law court, except in mandamus are *in rem* and not *in personam*. If the judgment is that the plaintiff do recover a specific piece of property, the sheriff places the plaintiff in possession of that property. It the judgment is that the the plaintiff recover a certain sum of money as damages and the defendant fails to pay, the judgment plaintiff may then have a writ of execution issued to the sheriff authorizing and commanding the sheriff to levy upon the defendant's property, to sell it at public sale and with the proceeds to satisfy the plaintiff's judgment. In the extraordinary common law action of mandamus, and in equity, however, the decree merely orders the defendant to do or to refrain from doing some act; if he refuses in spite of being imprisoned and having his property sequestered, the court is unable to bring about a performance of the decree, apart from statute.[4]

§ 10. Decree of equity court does not affect the legal right.

Another way of saying that equity acts only *in personam* is to say that the decree of an equity court does not affect the legal right; the legal right is affected only by that which is done in obedience to the decree. This was the natural result of equity being administered by a separate court. If a common law court had said that the legal right was in A and an equity court had said that it was not in A but in B,

3. The judgment of an equity court is usually called a decree.

4. It was a weakness of the common law courts that except in mandamus, they were unable to command the defendant; it is a weakness of equity that without a statute it can proceed only by command. Statutes are desirable not only to give equity courts jurisdiction *in rem* but also to have their decrees operate *in rem*. See *post* § 12. In most states statutes of this sort have been passed. See Huston, The Enforcement of Decrees in Equity, pp. 157-183 for a compilation of the statutes.

chaos and confusion as well as conflict would have resulted.

Thus, a decree that an obligation be delivered up and cancelled does not of itself avoid the obligation; as it has been expressed:[1] "But to execute this [decree], the chancery can do nothing but order him to prison, there to remain until he will obey. And this is all that the court can do. And if the party will lie in prison rather than give up the obligation the other is without remedy, and so the Chancellor has no power to nullify the obligation."

So, an injunction against negotiating a negotiable note does not destroy the negotiability of the note.[2] An injunction against the enforcement of a common law judgment—for example, on the ground of its having been fraudulently obtained—does not affect the validity of the judgment;[3] if the defendant is willing to remain in prison for contempt, he may have execution on the judgment. And a decree that the defendant convey land to the plaintiff does not affect the legal title to the land. Hence, if the defendant is insane or paralytic and therefore unable to execute a conveyance, all that the equity court can do is to decree that the defendant convey when he shall have recovered from his insanity[4] or paralysis.[5] Legislation is especially necessary here in order to avoid injustice, and statutes usually give power in such cases to courts of equity to take the legal title and pass it either by their decree or by conveyance executed by some officer of the court such as a master in chancery.

1. J. R. v. M. P. and Others, (1459) Year Book 37 Henry VI, folio 13, placitum 3, 1 Ames Eq. Cas. 1.

2. Winston v. Westfeldt (1853) 22 Ala. 760, 1 Ames Eq. Cas. 3.

3. See Littleton 37; "If judgment be given in an action at common law, the chancellor cannot alter or meddle with the judgment, but he may proceed against the person for corrupt conscience, because he will take advantage of the law against conscience;" 1 Ames Eq. Cas. 4.

4. Owen v. Davies (1747) 1 Vesey Sr. 82.

5. Pegge v. Skynner & Richardson (1784) 1 Cox Eq. Cases 23, 1 Ames Eq. Cas. 6.

§ 11. Commanding an act within the jurisdiction which affects property outside.

If the defendant has been properly served with process or has submitted to the jurisdiction of the equity court, it is not necessarily an objection to giving a decree that the act commanded to be performed would affect property outside the jurisdiction. In Gardner v. Ogden[1] suit was brought in New York to avoid as fraudulent a deed to land in Illinois, and to compel the defendant to reconvey the land to the plaintiff. The court gave the decree asked for. It is to be noted that the act of conveyance could take place in New York; it was not necessary for the defendant to go to Illinois to do it. If the conveyance is executed in New York according to the formalities prescribed by Illinois law as to deeds of conveyance of land, it will be recognized and given effect to in Illinois; it will be no more an objection that the defendant acted under the compulsion of a New York court than if he had acted under the complusion of an Illinois court. This is so because of the provision in the United States Constitution requiring that full faith and credit be given to the judgments and decrees of sister states.[2] There

1. (1860) 22 N. Y. 327, 1 Ames Eq. Cas. 6.

2. Where a mortgage covers land which is partly in one state and partly in another, and foreclosure and sale is sought, it is obvious that in order to secure practical justice by having the property sold as a unit the court of one state must act; the court first appealed to will usually give relief by requiring the mortgagee to convey the foreign property to the purchaser at the foreclosure sale. Byrne v. Jones (1908) 159 Fed. 321; Union Trust Co. v. Olmstead (1886) 102 N. Y. 729, 7 N. E. 822, 1 Ames Eq. Cas. 23. When the land mortgaged is entirely in another jurisdiction a court of equity will refuse to grant a decree of foreclosure and sale because that would usually require the presence of its own court officers in the other jurisdiction or else a sale at a distance from the property, which would mean probably a sale at a serious sacrifice, but in a few cases a decree of strict foreclosure (i. e. without sale) has been granted; but it would seem that such decrees should be given only in exceptional cases. See Eaton v. McCall (1894) 86 Me. 350, 29 Atl. 1103, 41 Am. St. Rep. 561.

seems to be no insuperable objection to an equity court of one of our states decreeing the conveyance of land in Canada or England, both of which countries have the same legal system as our own,[3] but it is believed that no case of that sort has arisen; it is not likely to arise in the future because of the large number of statutes giving equity courts jurisdiction *in rem* and giving their decrees operation *in rem*.[4]

§ 12. Statutes giving jurisdiction in rem.

As stated previously, an equity court gets its jurisdiction—apart from statute—only by personal service of process. So called "constructive service" by publication is not service at all; it is never sufficient as a basis of personal jurisdiction; it is appropriate only where the jurisdiction of the court is based on the control of the property and it then performs the office of notifying persons interested in the property to come in and litigate to protect their interests. So called constructive service is proper in divorce proceedings were jurisdiction is based upon the matrimonial domicile;[1] also in foreign attachment proceed-

3. It is not likely that any Anglo-American court would render a decree directing the conveyance of land in Continental countries, because conveyances in those countries must usually be made by the parties going before the local magistrate. Since there would be no way of overseeing the carrying out of the decree such a decree would be futile and a court of equity will not waste its time giving an obviously futile decree. See *post* § 13, 26 Harv. Law Rev. 294; Waterhouse v. Stansfield (1852) 10 Hare 254.

4. See 6 Ill. Law Rev. 545 criticising Poole v. Koons (1911) 252 Ill. 49, 53, 96 N. E. 556 for saying that there was no difference between ordering the defendant to convey Arkansas land and ordering the master in Chancery to do so.

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1. For example, if the matrimonial domicile is Ohio, the removal of either the husband or wife from the state after cause for divorce has arisen will not affect the right of the other party. Suit may be brought in the Ohio court, and notice of the proceeding be published according to statutory requirements. The statute in order to be due process must provide for reasonable publicity. See 13 Col. Law Rev. 241.

ings[2] where the jurisdiction is based upon control over the property attached and in garnishment proceedings[3] where the jurisdiction is based upon the control over the debtor's chose in action which the court has through its control over the debtor's obligor.

If a court of equity is by statute given jurisdiction *in rem,* so called constructive service by publication is proper. But in addition to the power to take jurisdiction *in rem* a court of equity needs also to be given the power to render decrees *in rem.* This may be done either expressly or by necessary implication. If a statute authorizes courts of equity to exercise jurisdiction *in rem,* it would seem, by necessary implication, to authorize the giving of decrees *in rem* in such cases, because it would be of no value to hear the case without personal service unless the court could also give a decree not involving a command to the defendant. But if a statute merely provides for execution *in rem* it is not a necessary implication that the court may exercise jurisdiction *in rem,* because power to give a decree *in rem* is important even where the court has personal jurisdiction; for example, where the defendant has been duly served with process but is now insane or absents himself from the jurisdiction or merely refuses to obey the command of the court. On the other hand, if a statute merely provides for the exercise of jurisdiction *in rem* the necessary implication of power to give decrees *in rem* will only exist as to proceedings which are begun under such a statute; the cases just mentioned where the proceeding has been *in personam* but the defendant is unable or unwilling to perform the personal decree would not be covered by

2. If A of Nebraska owes a debt of $500 to B of Iowa and owns some cattle in Iowa, B may attach the cattle and thus avoid having to sue A in Nebraska.

3. If X of Iowa owes A, of Nebraska, a debt, B is able by garnishment proceedings in Iowa to compel X to pay the debt to B instead of to A and thus to get payment of his own claim against A.

the implication.[4] It is therefore of great importance that legislation should expressly provide not only for jurisdiction *in rem* but also for giving decrees *in rem* in cases where the proceeding is *in personam* but a decree *in personam* would not be effective. A Texas statute providing that "when the judgment is for the conveyance of real estate or for the conveyance of personal property, the decree may pass title to such property without any act to be done on the part of the party against whom the judgment is rendered" provides, of course, only for execution *in rem*, not for jurisdiction *in rem* and therefore does not authorize a suit to quiet title against non-resident defendants.[5] On the other hand, an Illinois statute which authorized the exercise of *in rem* jurisdiction was held thereby to authorize also the rendering of an *in rem* decree in such a proceeding.[6]

Such legislation should be made broad enough to cover all the cases where jurisdiction *in rem* and execution *in rem* are needed. In Massachusetts it was held[7] that a statute giving courts of equity power to take title away from a trustee who was an infant or insane or out of the state and vest it in a new trustee was not broad enough[8] to authorize similar action in a suit for specific performance against a non-resident.[9]

4. For cases of jurisdiction *in personam* followed by a statutory decree *in rem*, see Matteson v. Scofield (1871) 27 Wis. 671; Langdon v. Sherwood (1888) 124 U. S. 74.

5. Hart v. Sansom (1884) 110 U. S. 151, 1 Ames Eq. Cas. 11.

6. Cloyd v. Trotter (1886) 118 Ill. 391, 9 N. E. 500.

7. Merrill v. Beckwith (1895) 163 Mass. 503, 40 N. E. 855, 1 Ames Eq. Cas. 19.

8. If the land as well as the person is outside the jurisdiction, statutes are powerless to aid the plaintiff. Jurisdiction must be based either on the property or on the person. Hence if in a suit for specific performance of a contract to convey land the defendant is in New York and the land is in Pennsylvania, no suit whatever can be brought in any other state; Corbett v. Nutt (1870) 10 Wall 464.

9. See 15 Col. Law Rev. 37-54; 106-141; 228-252; Powers of Courts of Equity, by W. W. Cook.

§ 13. Enjoining acts abroad. Suits abroad.

A defendant within the control of an equity court may be enjoined from doing an act anywhere in the world, since he may obey the decree without leaving the jurisdiction or subjecting himself to the laws of other countries.[1] For example, it will in a proper case enjoin a defendant from committing a trespass in another jurisdiction.[2] Where the act sought to be enjoined is that of suing the plaintiff in another jurisdiction, an injunction will usually be granted in those cases where relief would have been given against such a suit in the same jurisdiction.[3] On the other hand, the mere fact that the plaintiff has succeeded in getting personal service upon one who has started (or is about to start) suit against the plaintiff in another jurisdiction, does not entitle him to have the suit in the other jurisdiction enjoined and the merits of the case tried in the court in which he is plaintiff. Whether a court will give relief will depend upon the balance of convenience in the particular case. The respect which is due to foreign tribunals should require the plaintiff to make out a very strong case before relief should be granted. The general rule is that the court which first gets jurisdiction is entitled to retain it. As said by Mr. Justice Grier in Peck v. Jenness,[4] the rule is founded on necessity. "For if one may enjoin, the other may retort by injunction, and thus the parties be without remedy; being liable to a process for contempt in one if they dare to proceed in the other." The mere fact that the foreign court is likely to decide the case contrary to the way in which the decision would be made in the court where the injunction is

1. Philadelphia Co. v. Stimson (1912) 223 U. S. 605; 26 Harvard Law Review 293.

2. Great Falls Mfg. Co. v. Worster (1851) 23 N. H. 462.

3. Portarlington v. Soulby (1834) 3 Mylne & Keen 104; 1 Ames Eq. Cas. 24.

4. (1848) 7 How. (U. S.) 612, 625.

sought is not ground for relief.[5] But in Miller v. Gittings[6] the court enjoined a suit in New York on the ground that the defendant was attempting thereby to evade the policy of the Maryland law prohibiting imprisonment for debt. And in some cases the evasion of exemption laws by foreign attachment has similarly been enjoined.[7] It is to be noted, however, in these cases that much emphasis is laid upon the fact that the defendant was a citizen of the state in which the injunction was obtained, the inference being that the court would probably not grant such relief against a non-resident, and apparently there are no cases going so far.

§ 14. Decrees involving affirmative acts abroad.

Where the carrying out of a court's decree would involve affirmative acts of its own officers abroad, relief will usually be refused. Thus, in a suit for partition of foreign land, if there is any dispute as to whether the land can properly be divided specifically, it would be necessary for an officer of the equity court to go on the land in order to make a proper sale; since the court is not in a position to protect its officer it will generally refuse to exercise its jurisdiction.[1]

A somewhat similar situation arises where a decree is sought commanding a defendant to do some act abroad. Relief is usually denied. For example, a court will generally refuse to order the abatement of a foreign nuisance.[2] Specific performance of a contract to dig a ditch in another state has been denied.[3] And

5. Royal League v. Kavanaugh (1908) 233 Ill. 175, 84 N. E. 178. See 26 Harvard Law Review 292-296; 347.

6. (1897) 85 Md. 601, 37 Atl. 372.

7. Snook v. Snetzer (1874) 25 O. St. 516; Wilson v. Josephs (1886) 107 Ind. 490, 8 N. E. 616.

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1. Carteret v. Petty (1675) 2 Swanston 323, note (a), 1 Ames Eq. Cas. 21.

2. People v. Central R. Co. (1870) 42 N. Y. 283.

3. Port Royal R. Co. v. Hammond (1877) 58 Ga. 523.

a decree declaring void a conveyance of foreign land has also been refused.[4] In some cases, however, relief has been granted. In the Salton Sea Cases[5] the plaintiff's land in California was wrongfully flooded by an act of the defendant in Mexico; the Federal court gave an injunction against further flooding of the California land tho this as a practical matter involved the defendant's doing an affirmative act in Mexico. While this case may be justified as a sound exercise of discretion under the circumstances, it is rather difficult to defend the English case of Langford v. Langford.[6] In that case an English court went so far as to order the defendant to procure an act to be done in Ireland which was in violation of the Irish law, and for refusal to obey the order imprisoned him for contempt. The decision is objectionable not only on the ground of placing the defendant in an embarrassing predicament but also on the ground that the court failed to accord the proper respect to the law of a sister jurisdiction. It is not likely that any American court would go so far.

In Kempson v. Kempson[7] the defendant, domiciled in New Jersey, desiring to get a divorce from the plaintiff, went to North Dakota and resided for ninety days in order to obtain such a domicile as would be recognized by the North Dakota courts as sufficient basis for jurisdiction for divorce. Having filed suit for divorce the plaintiff later succeeded in getting personal service on him in New Jersey, where she still resided, and obtained a decree ordering him not to continue with the divorce proceedings; in violation of this decree he went ahead with his North Dakota suit and obtained the divorce. The New Jersey court committed him to prison for contempt until he should have the decree in the North Dakota divorce proceedings set

4. Carpenter v. Strange (1891) 141 U. S. 87.

5. (1900) 172 Fed. 792. See also Rickey L. & C. Co. v. Miller (1910) 218 U. S. 258.

6. (1835) 5 L. J. N. S. Ch. 60.

7. (1899) 58 N. J. Eq. 94, 43 Atl. 97, 1 Ames Eq. Cas. 26.

aside. The court seemed to take for granted that the defendant could easily, of his own motion, procure the reversal of the divorce decree; if the North Dakota court had refused such a reversal, it would have been embarrassing either for the defendant or for the New Jersey court. The New Jersey court was, however, probably justified in taking the position it did, because most common law jurisdictions refuse to give effect to such divorces on the ground that the court does not really have jurisdiction;[8] hence the assumption of jurisdiction by the North Dakota court at the suit of the defendant was really a fraud upon the plaintiff and she was entitled to the full power of the equity court in protecting her; while she might have successfully fought the divorce in all other jurisdictions except in North Dakota because most of them would have considered the divorce a nullity, yet this would have entailed a great hardship upon her.

§ 15. Rule and discretion. Importance of discretion in equity.

It has been in the past and still is today not uncommon in Oriental countries to have justice administered without rules, that is, according to the unfettered will of the magistrate.[1] But altho rules are not absolutely essential to the administration of justice, they are practically expedient especially in a society having extensive commercial transactions, and therefore in Occidental countries magistrates are governed to a large degree by rules. But not entirely, for human ingenuity has never yet been able to devise, either by statute or precedent, a system of rules which would properly provide for every possible contingency; it is always necessary, therefore, that there be some margin

8. See Streitwolf v. Streitwolf (1900) 181 U. S. 179.

1. This has been aptly characterized as personal justice or justice without law. 5 Columbia Law Review 20; 13 *id.* 696-7.

for personal action on the part of the magistrate in the particular case.

The proportionate amount of rule and discretion not only varies with different countries and legal systems, but with different periods of time in the same system. Equity began as a reaction against a system that had become over-rigid, toward justice without law, and for some time Selden's statement was not far from the truth when he said:[2] "Equity is a roguish thing. For law we have a measure, and know what we trust to, Equity is according to the conscience of Him that is Chancellor; and as that is larger or narrower, so is Equity. 'Tis all one as if they should make his foot the standard for the measure we call a Chancellor's foot. What an uncertain measure this would be. One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'Tis the same thing in the Chancellor's conscience." Once the position of the Chancellor as a judge became assured, equity itself began to be reduced to a system of rules, wherein the magistrate retained a little greater discretion than the common law judge had and more attention was paid to the circumstances of the particular case. During the past century which has been a period of industrial and commercial expansion the intense interest in the security of legal transactions and acquisitions has tended to reduce the discretion in equity cases, especially in this country, to such a degree that it has been pointed out that equity has really become decadent.[3] If the process of crystallization continues to such an extent that discretion is all but eliminated, we can confidently make a prediction, based upon past history, that there will be another reaction in favor of elasticity

2. Selden's Table Talk, Title, Equity.

3. 5 Col. Law Rev. 20-35, The Decadence of Equity, by Roscoe Pound. In Brooks and Co. v. Blackburn Benefit Society (1884) App. Cas. 857-866 Blackburn, J., said: "This appears to be justice; whether it is technical equity is another question which I think is not now before the house."

against rigidity, especially in those fields of the law where facts are so multitudinous and various that discretion is indispensable, It is against this over-crystallization of equity that every lawyer and jurist should fight.[4]

§ 16. Equity will not be ousted because law courts have adopted an equitable remedy.

It is frequently said[1] that "jurisdiction once acquired in chancery over any subject or class of rights, is not taken away by any subsequent enlargement of the powers of the courts of common law, nor by reason of any new modes of remedy that may be afforded by those courts. . . . Hence arose a wide range of concurrent jurisdiction[2] within which chancery proceeded to administer appropriate remedies, without regard to whether a like remedy could be had in the courts of law." While this is generally true[3] there are at least two fields from which equity has retreated. At a time when the common law courts held that choses in action could not be assigned, equity courts gave a remedy to the assignee;[4] later, after the common law courts devised a remedy by treating the assignee as an agent of the assignor, equity courts refused to give relief

4. Roughly speaking, fixed rules are highly desirable in that which we are accustomed to speak of as property and commercial law; while discretion should have a larger part in those branches of the law which deal with the complexities of human conduct, such as mistake, fraud, unfair conduct, etc. See 24 Harv. Law Rev. 298, The Decadence of the System of Precedent, by John B. Sheppard, Jr., discussing the tendency of our whole legal system to become artificial and mechanical.

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1. Jones v. Newhall (1874) 115 Mass. 244; Story, Equity Jur. § 641.

2. See 16 Cyc. 33.

3. See 16 Cyc. 37.

4. In Squib v. Wyn (1713) 1 P. Wms. 378 the court states that "choses in action are assignable in equity but not at law" as if it were then well settled. See *post* § 261.

merely because the plaintiff was an assignee.[5] Furthermore, in early times, equity exercised a criminal jurisdiction which it later abandoned.[6]

C. Maxims of Equity.

§ 17. Nature and value of maxims.

In addition to the jurisdiction rule already discussed that equity acts *in personam,* there are rules—or principles rather, because they are not exact enough to be properly called rules[1]—which have been expressed in the form of maxims, or short, pithy statements. There is no general agreement as to the number or identity of these maxims and the fact that a principle is or is not stated in the form of a maxim is no certain clue to its importance. Some equitable principles which have never been expressed in that form are of much greater scope and value than some of those that are. But since it is so common to cite the maxims, it has been thought desirable to discuss them briefly.

Maxims are of little or no value[2] to the student—in fact, they may be worse than useless—unless he gets a fairly clear idea as to their meaning and applicability. The following sections will, therefore, be

5. If the assignor threatened to collect, equity might, of course, enjoin him from doing so because of the threatened irreparable injury to the assignee.

6. See 16 Harv. Law Rev. 389-403, The Revival of Criminal Equity, by Edwin S. Mack; and see *post* § 244.

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1. Phelps' Juridical Equity 183: "But equity, life war, like political economy, like law itself, cannot claim to be an exact science. Its maxims are not like the axioms of mathematics, inflexibly and universally true. The blended products of ethics and expediency, they cannot be expected to be more than approximations to the absolute truth."

2. See 9 Harv. Law Rev. 13-26, The Use of Maxims in Jurisprudence, by Jeremiah Smith. While maxims are of doubtful value to the student of equity, the psychological influence of maxims upon equity judges has been very great, especially during the formative period.

devoted to showing what idea the maxim is meant to express and the field of equity in which it is fairly safe to apply it.

§ 18. Where there is a right there is a remedy.

If *right*[1] be taken in the narrow sense of legal or jurdical right, as opposed to a mere moral right or interest, this maxim expresses only a truism. While it is true that we do have some legal rights without remedies to enforce them such instances are exceptional. The most common illustration is that of a right still existing after the remedy has been taken away by a statute such as the usual Statute of Frauds[2] or Statute of Limitations; even here, however, it is only the direct remedy by action that is taken away; the indirect, defensive remedy still exists.

If right be taken in the broader sense of moral right or interest, the maxim represents the goal of every system of civilized law toward which it is constantly working but which, in the nature of things, is unattainable. It is thus a maxim of the Roman Law and also of the common law as well as of equity; but equity put new life into it and made it the basis of its growth. The equitable rights of the *cestui que trust* and of the mortgagor are among the most striking effects of equity's expansion under the influence of this principle. With the gradual crystallization of equity, already spoken of,[3] the vitality of this maxim has become lower and lower, but has never been entirely extinguished. While it seems impossible for equity

1. Historically, remedies existed before abstract rights were thought of; the latter are inferred from the former; and where there never has been a remedy it is difficult to draw the inference of an abstract right. See *post* § 83, note 1.

2. In a few states failure to comply with the statute of frauds makes the transaction void and not merely unenforcible.

3. See *ante* § 15.

now to add large fields to its jurisdiction,[4] it seems still to be true that if a statute creates a new right which cannot adequately be enforced at law, equity will contrive in some way to enforce it.[5]

§ 19. Equity regards substance rather than form.

The meaning of this maxim is obvious and it is such a salutary principle that it deserves to be applied throughout the whole field of equity. The overcrystallization of equity during the past century to which allusion has already been made[1] has considerably lowered the present day vitality of the maxim and we are compelled to fall back upon the past achievement of equity for illustrations of the influence of this principle. Perhaps the most striking example is the relief given to a mortgagor who has failed to pay his debt on the day.

4. Note for example, the recent failure of equity to give relief in cases of the violation of an alleged right of privacy. Roberson v. Rochester Folding Box Co. (1902) 171 N. Y. 538, 64 N. E. 442, 59 L. R. A. 478. See *contra* Pavesich v. New England Life Insurance Co. (1905) 122 Ga. 190, 50 S. E. 68. See also Rees v. City of Watertown (1873) 19 Wall. 107. In that case the holder of bonds issued by the defendant city brought suit against the city and obtained judgments upon which executions were returned unsatisfied. He then procured a mandamus against the city officials directing them to levy and collect a tax upon the taxable property of the city in order to pay the judgment; before the suit could be served a majority of the city council resigned their offices. Plaintiff then asked the equity court to direct its marshal to seize property of the citizens, sell it, and apply the proceeds to pay his judgments. The United States Supreme Court held that altho the plaintiff had been unreasonably obstructed in the pursuit of his legal remedies, a court of equity was powerless to give relief, because the legal remedy was theoretically complete. This decision shows what a great change has come over equity since the time when the English Chancellor gave relief upon the sole ground that the local court was controlled by the plaintiff's opponent and therefore denied justice. See Petition of John Hampton (1337) Select Cases in Chancery, Case 133.

5. Rhoten v. Baker (1902) 104 Ill. App. 653; Toledo, A. A. & N. M. Railroad Co. v. Pennsylvania Co. (1893) 54 Fed. 746, 19 L. R. A. 395.

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1. See *ante* § 15.

By the terms of the old common law mortgage such a default forfeited the entire interest in the property to the mortgagee; equity, however, insisted that the substance of the transaction was that the mortgagee should be paid his debt with interest, and hence he could not properly complain if the payment were not made exactly on the day set for payment.[2] Equity dealt in a similar way with all forfeitures[3] and penalties.[4] The whole jurisdiction of equity over trusts is frequently considered as in some degree a product of this principle of regarding the interest of the *cestui que trust* as the real substantial ownership, the corresponding legal estate of the trustee being treated as a mere form and shadow.[5] A more specific application in the subject of trusts is the equitable doctrine that equity will not allow a trust to fail for want of a trustee.[6] The doctrine of equity that a defectively executed mortgage or contract to give a mortgage will be treated as a mortgage[7] in equity is properly referred to this and the following maxim that equity regards that as done which ought to be done.

§ 20. Equity regards that as done which ought to be done.

Though the above is the more usual expression, there is a narrower and more accurate statement that equity regards that as done which was *agreed* or *directed* to be done. In addition to the doctrine of equitable mortgages already alluded to as in some degree refer-

2. Barrett v. Hinckley (1888) 124 Ill. 32, 42, 14 N. E. 863.

3. Birmingham v. Lesan (1885) 77 Me. 454, 1 Atl. 151; see *post* § 457.

4. Cross v. McClenahan (1880) 54 Md. 21, 24.

5. Clay v. Freeman (1885) 118 U. S. 97, 108; see *post* § 280.

6. Poindexter v. Burwell (1886) 82 Va. 507, 514; see *post* § 272.

7. Hall v. Hall (1882) 50 Conn. 104, 111. Wyatt v. Carwithen (1883) 21 W. Va. 516, 520; Atkinson v. Miller (1890) 34 W. Va. 115, 11 S. E. 1107, 9 L. R. A. 544. See *post* § 456. For a further discussion of the maxim, see Phelps, Juridical Equity § 194-§ 204.

able to this principle,[1] several others may be mentioned. The doctrine of equitable conversion, whereby real estate which has been directed to be turned into personalty, and personalty which has been directed to be turned into realty, are treated for certain purposes as if the directed conversion had already taken place, is directly referable to this maxim.[2] So is the doctrine in specific performance of contracts to convey property, that the purchaser is treated, from the moment the contract is made, as the owner in equity.[3] So also is the rule that equity regards that as done at the time when it should have been done. For example, trustees are usually chargeable with interest from the time at which it was their duty to make proper investments, tho no interest has actually been received.[4] And where a specifically enforcible contract to convey land has been made, the purchaser is usually entitled to rents and

1. This is true historically and psychologically rather than analytically. From the modern analytical point of view a defectively executed mortgage is treated as a mortgage in equity because a court of equity would give specific performance of a contract to give a mortgage. See *post* § 51. Similarly the doctrine of equitable conversion is usually based upon the fact that equity will as a settled part of the rules governing trusts compel the trustee to convert land into money or *vice versa*. See *post* § 448. And the doctrine of the purchaser's equitable ownership in land rests upon his right to get specific performance of the contract to purchase. See *post* § 83. In fact nearly all the cases referable to the maxim can now be based upon some recognized head of equity jurisdiction. In Frederick v. Frederick (1719) 1 P. Wms. 710, however, the decision seems to rest upon the maxim above. In that case one Frederick agreed, upon his marriage to a ward of the City of London, to become a freeman of the city but failed to do so. After his death it was held that for the purpose of determining the widow's rights in his property he should be considered as a freeman. Whether the aldermen of the city or the wife could have specifically compelled Frederick in his lifetime to become a freeman does not appear. But with very few exceptions the following statement of the rule will cover all the cases. "Equity regards that as done which it would have specifically compelled to be done."

2. See *post* § 448.

3. See *post* § 83.

4. Keller v. Harper (1884) 64 Md. 74, 82, 1 Atl. 65. See *post* § 327.

profits and the vendor to interest from the time the contract should have been performed.[5]

The maxim is purely equitable, not legal; hence the rights which equity has created under the influence of the maxim are, like all other equitable rights, not enforcible against a *bona fide* purchaser for value without notice.[6]

§ 21. Equity imputes an intent to fulfill an obligation.

This maxim seems to be a specialization of the one just discussed. It is rarely quoted and its scope and application are quite limited. Perhaps the most important field in which the principle can be said to have had much influence is in that of constructive trusts. Though these equitable obligations to restore specific property which the defendant unjustly detains from the plaintiff are now recognized to exist independently of the intentions of the parties, and are therefore not really trusts at all, yet they were at first imposed under a fiction of an implied intent. Thus if the express trustee should convey the trust property to X who had notice of the trust, equity held that X was bound by the trust on the ground that the court would presume that X meant to carry out the trust;[1] likewise, if a trustee invested trust money in property, it was presumed that he intended to carry out his obligation as trustee and not to commit a fraud.[2] Still a third illustration is the rule of equty that if a trustee mingles trust money with his own private bank ac-

5. See Minard v. Beans (1870) 64 Pa. 411, 1 Ames Eq. Cas. 217, 219. See *post* § 118. And see 15 Col. Law Rev. 256.

6. Bower v. Berry (1851) 3 Md. Ch. 359, 362. Casey v. Cavaroc (1877) 96 U. S. 467, 491. See *post* § 301.

1. "For it shall be intended since he parted with the land without consideration that he parted with it in the most proper way, i. e., to hold it as he held." Anonymous, Year Book (1522) 14 Henry VIII, Folio 4, placitum 5, Ames' Trust Cas. 283. See *post* § 84.

2. See *post* § 295.

count, and later checks out sums for his private use, he is presumed to have intended to draw upon his own money and not upon the trust money.[3] Though these rules came about by the use of the fiction of intendments or presumptions, they are now treated as well settled rules of substantive equity.[4]

§ 22. Equity acts specifically and not by way of compensation.

It has already been pointed out that one of the reasons for the existence of equity was the inability of the common law to command the defendant or to give preventive relief. The subjects of specific performance of contracts,[1] and specific reparation for and prevention of torts[2] as well as rescission for mistake or fraud[3] have grown up at least partly as the result of this corrective principle. While equity thus seeks to place the parties in the position which they ought to occupy, and would have occupied but for the tort or breach of contract, it

3. See *post* § 297 for a more accurate statement.

4. Another equitable doctrine which is usually traced to the influence of this maxim is that of satisfaction. There are two chief applications of the doctrine. If a parent makes a will giving a legacy to a child and later makes an advancement to the child, there is a presumption that the advancement was in satisfaction of the legacy either wholly or partially, depending upon the relative amounts; and if a debtor leaves a legacy to his creditor, the presumption is that the legacy was meant to be in satisfaction of the debt. Green v. Green (1875) 49 Ind. 417. It is to be noted that the doctrine is only one of presumption of intent; if the evidence of a contrary intent is proved, it will be given effect. See 2 Williams, Executors, 7th American Edition, 629 on the modern unpopularity of this presumption. See *post* § 459. In England where marriage settlements are common there is a presumption that an act done later by an obligor which might be considered to be in performance of his obligation, was meant by him as such performance. Here, too, the presumption of "performance," as is was called, could be rebutted. See Wilcocks v. Wilcocks (1706) 2 Vernon 558.

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1. See *post* Chap. II.
2. See *post* Chap. III.
3. See *post* Chap. VII.

should be pointed out that if the parties are properly in equity but specific relief is impossible equity will then proceed to give compensation in lieu thereof.[4]

§ 23. Equity prevents a multiplicity of suits.

As previously stated,[1] a common law court could only deal with a two sided case; this was at least partly due to the jury system. The equity court, not having a jury system, could deal with many-sided cases, and thus avoid an unnecessary amount of litigation; in addition to the illustrations already given from partnership law may be mentioned bills of interpleader.[2] Another large field of equity which is based upon the desire of equity to avoid multiplicity of suits is that of bills of peace.[3] Still another comprises those cases where equity gives an injunction to avoid circuity of action.[4]

4. For example, if B contracts to convey land to A and A sues for specific performance without knowing that specific performance has been rendered impossible by reason of B's transfer of the land to a *bona fide* purchaser for value without notice, equity will give A such compensation as he would be able to get in an action at common law and will thus not compel him to begin another action. See 30 Harv. Law Rev. 188. For a discussion of the effect of the codes on this point, see Haffey v. Lynch (1894) 143 N. Y. 241, 38 N. E. 298; 16 Col. Law Rev. 326-329.

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1. See *ante* § 5.
2. See *post* Chapter IX.
3. See *post* Chap. X.
4. A single illustration will suffice. If A having a claim against B for $1000 contracted with B never to sue him on the claim, the contract was no defense at common law. But if A in breach of his contract should sue B and obtain judgment and satisfaction thereof, A would be able to recover the same amount in an action for a breach of the contract never to sue. After both actions the parties would be in the same position as they were at first, except for the payment of court costs and attorney's fees. Equity therefore at the suit of B interfered by giving a perpetual injunction against A's suing on the original claim. See *post* § 67.

§ 24. Equity delights to do justice and not by halves.

This maxim, which is not always classed as such, is really only a special instance of the maxim just previously discussed. The significance of the maxim is in the last phrase. A more complete statement is that equitable jurisdiction having once attached, it will be continued for the final adjudication of all rights involved and thus avoid further litigation in the future, even tho this involves the giving of relief which is usually classified as legal.[1]

§ 25. Equality is equity.

The meaning of this maxim is that unless there is a specific requirement to the contrary, equity will treat all members of a class as upon an equal footing and will distribute benefits or impose charges either equally or in proportion to the several interests.[1] A few of the many practical applications are to contribution between co-sureties,[2] the distribution of insolvent estates,[3] marshalling of assets,[4] and the abatement and ademption of legacies.[5] The doctrine has never been applied to defeat a creditor who has obtained a lien or a preference which is allowed to him by the common law, but its influence on legislation has brought about many reforms, such as bankrupt and insolvent laws, the ab-

1. If an insurance company contracted to insure A's premises against fire and a loss occurred before the policy was issued, A was formerly not allowed to sue at law because of being unable to produce the policy. Equity would, however, give specific performance of the contract to issue a policy and having jurisdiction would also decree that the insurance company pay the amount of the loss though the latter by itself is common law relief. See *post* § 52. Several other illustrations of the principle will be found later in the book. See, for example, *post* § 189, note 3.

1. See 16 Cyc. 137.
2. See 32 Cyc. 276.
3. See Riley v. Carter (1893) 76 Md. 581, 25 Atl. 667.
4. See 26 Cyc. 927; see *post* § 454.
5. See 40 Cyc. 1899, 1914.

olition of the distinction between different classes of unsecured debts and the change in the common law presumption which formerly favored joint tenancy to a presumption in favor of tenancy in common.[6]

Where the maxim has been applied to parties who are not members of a class the results have not always been happy. The doctrine of mutuality as a basis for giving specific performance and the doctrine of lack of mutuality as a basis for denying specific performance are most probably the result of the maxim.[7]

§ 26. Equity follows the law.

In the meaning that equity assumes the existence of the legal system and the rights created by it, equity always follows the law. Tho in some sense a rival of the common law, equity never attempted to compete with it directly by denying the existence of rights or remedies created by the common law system.[1]

In the meaning that equity follows and applies the legal rule, the maxim is partly true and partly untrue. If equity always applied the common law rule, there would of course be no such thing as equity; on the other hand, there are fields of the common law, e. g., the law of descent and distribution of property and the great bulk of the law of evidence, in which the equity courts did not find it necessary or expedient to interfere; whenever questions relating to such subjects arise in the course of an equity suit, the equity court naturally applies the common law rule.[2]

There is still a third meaning which the maxim may have, viz., that equity frequently follows common law analogies. For example, equity not only left intact the common law rules of distribution of property with

6. See 23 Cyc. 485.
7. See *post* §§ 48, 172-181.

1. See *ante* § 10.
2. Cowper v. Earl of Cowper (1754) 2 Peere Williams 720, 753.

reference to legal estates, but, also applied these rules by way of analogy to equitable property interests such as the property interest of a *cestui que trust,* of a mortgagor and of a vendee of land under a specifically enforcible contract to convey.[3] Another illustration exists in the attitude of equity courts toward statutes of limitations; except in recent years these have applied only to common law actions and not to suits in equity, but equity courts have been accustomed, in the absence of special circumstances, to apply the statute to equity suits by way of analogy.[4]

It should be pointed out here that in a very true sense the reverse of the maxim is true, that law follows equity. Where there is a merger of law and equity, the equity rule usually prevails, in case of conflict, over the previous common law rule; this is sometimes provided for by statute, as in the English Judicature Act.[5] And in specifically enforcible contracts to convey land, the equitable right to specific performance prevails over any common law action for breach of contract.[6]

3. See *post* § 108 and § 308; see also Astor v. Smallman (1706) 2 Vermont 556, where it was held that if one of two joint *cestuis que trust* die, his interest goes to the survivor.

4. Where an equity court applies the statute of limitations by analogy, it is not necessary to plead the statute. The court takes judicial notice of it. Talmash v. Muggleston (1826) 4 L. J. Ch. 200; 1 Ames Eq. Cas. 343. Where law and equity jurisdictions are strictly concurrent (see *post* § 34), equity courts consider themselves bound by the statute. See Metropolitan Bank v. St. Louis Despatch Co. (1893) 149 U. S. 436; Hall v. Law (1880) 102 U. S. 461, 466; Weaver v. Leiman (1879) 52 Md. 708.

5. St. 36 and 37 Vict. c. 66; 38 and 39 Vict. c. 77. Unfortunately this has not always been the effect of American Codes of Procedure; 5 Col. Law Rev. 20. The law also follows equity in giving remedies in its own courts after remedies have been decreed by courts of equity. The right of a surety to indemnity against his co-surety was first recognized by equity and then later at law; so also was the right of the assignee of a chose in action; see *post* § 261.

6. In Seton v. Slade (1802) 7 Ves. 265, the purchaser was held entitled to specific performance even tho the vendor had been allowed at law to recover back his deposit on the ground of the purchaser's

§ 27. Between equal equities the law will prevail.

Where there are conflicting equitable rights in the same subject matter, equally meritorious and each one, if by itself, is sufficient to entitle the holder to equitable relief as against one holding the legal title, and the holder of one of the equities has also the legal title, a court of equity will decline to interfere on the ground that to do so would deprive the holder of the legal title of his property without justification. This policy is the basis of the very important equitable doctrine of *bona fide* purchaser for value without notice.[1] For example, if a trustee in violation of his trust sells and conveys the trust property to X who secures the conveyance and pays therefor in good faith before notice of the trust, he will be allowed to keep because he stands in as meritorious position as the *cestui que trust*,—i. e., his equitable right to the land is just as great as that of the *cestui*—and having the legal title equity will not take it away from him.[2]

§ 28. Between equal equities the first in order of time prevails.

In this maxim equity is applying to equitable rights the same principle which the common law applies to common law rights. The common law maxim, perhaps derived from the Roman law, is that the one who is prior in time has the greater right. A moment's reflection will show that it is necessarily a principle of any system of law in civilized countries. It is important to point out, however, that the word "equal" should be emphasized; the test of priority is the last one to be resorted to and should not prevail when any

delay. And if the purchaser dies before obtaining specific performance, the right of his heir to get specific performance takes precedence over the right of his executor to sue at law for breach. See *post* § 108.

1. See *post* §§85, 301; 7 Col. Law Rev. 125; 1 Harv. Law Rev. 1-16.

2. See Ames Trust Cas. 286, note; see *post* § 301.

other valid ground for preference exists. Perhaps the following is the best illustration of the application of the maxim: where a purchaser from a fraudulent trustee pays the purchase money in good faith and then receives notice before obtaining the conveyance, he can not get the conveyance from the trustee as against the *cestui que trust* because the equity of the latter is prior to that of the purchaser; so if the purchaser actually gets the conveyance after notice, the *cestui que trust* may have him declared a constructive trustee of the property on the same ground.[1]

§ 29. He who seeks equity must do equity.

As already pointed out, the emphasis of the common law before equity was upon remedies; either a plaintiff was or was not entitled to a remedy against the defendant; the emphasis of equity, on the other hand, is laid upon duties and while this applied usually to defendants, it is also applied to plaintiffs as well. A court of equity being a court of conscience and being able to render a conditional decree, can and does insist that if a party, either plaintiff or defendant, wants the assistance of a court of equity, he must do what good conscience demands in the particular case. For example, if a court of equity is asked to rescind a contract, it will usually require, as a condition of its granting relief, that the plaintiff restore to the defendant any benefit he may have received from the transaction.[1] The maxim does not, however, extend to distinct transactions.[2] Another example occurs in the history of the development of the statutes commonly known as Betterment Acts. At the early common law, one who erected improvements even tho in good faith, upon the land of another did so at his peril, and if the owner won in an ejectment suit, the possessor had to bear the loss with-

1. See *post* §§ 84, 305.

1. See *post* § 394.
2. See Wilson v. Fowkes (1852) 9 Hare 592.

out compensation. If, however, the owner was unable for some reason to bring ejectment and had to seek the aid of a court of equity to get back his property, equity would compel him to compensate the *bona fide* possessor for improvements to the extent of the increase in the value of the land caused thereby.[3]

This maxim is usually considered to be the foundation of the doctrine of equitable estoppel which has been so widely absorbed by common law courts that we have become accustomed to think of it as a common law doctrine, and which is now usually referred to briefly as the doctrine of estoppel. The principle of estoppel is that when one party to a transaction has by his representations, either express or to be fairly implied from his conduct or silence, obtained an unfair advantage over the other, he will not be allowed to avail himself of it in a judicial proceeding. It is considered to be purely a defensive remedy;[4] if one wishes to use the same facts in an action as a plaintiff he must satisfy the much more rigid common law requirements of an action on the case for deceit;[5] even if he sues in an equity court for affirmative relief the same facts may not entitle him to recover.[6]

§ 30. He who comes into equity must come with clean hands.

This maxim is closely related to the one just preceding in that it is founded upon "good conscience;" but it differs from that one in placing an absolute bar against relief instead of requiring only the giving of a conditional decree.[1] Unlike the other maxim, too,

3. Dugan v. Baltimore (1889) 70 Md. 8, 16 Atl. 501; 11 Col. Law Rev. 85; 15 Cyc. 218, 219.

4. See Dickinson v. Colgrove (1879) 100 U. S. 578, 580.

5. An action on the case for deceit requires substantially that the defendant knew the representation to be untrue, whereas the doctrine of estoppel is frequently applied where the false representations were innocently made. See 24 Harv. Law Rev. 494.

6. See *post* §§ 381-387.

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1. See 10 Col. Law Rev. 671.

there is an analogous maxim in the common law and Roman law, which is usually given in the Latin form: *ex turpi causa non oritur actio;* of which the following is a free translation: "no cause of action will arise out of an illegal transaction." The difference between these two analogous maxims is one of degree; while the common law places a bar only against a plaintiff who is engaged in an illegal transaction, equity, with its higher ethical standards, might deny relief to one who was guilty only of unfair conduct or hard bargaining.[2] The maxim applies generally to parties seeking affirmative equitable relief whether by way of specific performance of contract,[3] specific reparation or prevention of torts, reformation, or rescission.[4] A specific example is that of a conveyance made without consideration to defraud the grantor's creditors; tho the creditors may have the conveyance set aside and the property applied to the payment of their claims, the grantor himself will be denied equitable relief against the grantee on the ground of unclean hands.[5]

§ 31. Equity aids the vigilant.

The common law had no time limit of its own within which claims were required to be asserted; this was regulated entirely by statute. Suits in equity were held not to be affected by these statutes of limitations, because not expressly included,[1] tho courts of equity

2. See *post* §§ 163, 168.

3. See *post* §§ 161-170.

4. See 28 Harv. Law Rev. 213 for a discussion of the maxim as applied to baseball players' contracts. As to whether it should be so applied as to prevent a husband who has contracted a second marriage, knowing he was already married, from having the second marriage annulled, see 9 Col. Law Rev. 269. See also 16 Harv. Law Rev. 444; 8 Col. Law Rev. 40. The court will not go outside the subject matter of the litigation; 25 Harv. Law Rev. 481; 2 Col. Law Rev. 118.

5. Bartlett v. Bartlett (1859) 14 Gray 277; see *post* § 396. See also 5 Col. Law Rev. 573.

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1. See *ante* § 26 note 4. See also Hevendon v. Annesley (1806) 2 Schoales and Lefroy 609.

frequently applied the statutory period by way of analogy to equity suits. In addition to this equity courts have a separate and independent doctrine, usually called laches, by which they refuse relief when there has been unreasonable and unexplained delay in asking for relief or in prosecution of the claim after suit is filed. There are no hard and fast rules as to what amounts to laches; it is a question to be determined upon all the facts by the court in the exercise of its judicial discretion. While a shorter time than the analogous statutory period may thus bar the plaintiff, the doctrine may operate in his favor by giving him a longer time where he has been in ignorance of his rights, especially when there has been concealment of the cause of action on the part of the defendant.[2]

§ 32. A rule of equity will never be applied to reach an inequitable result.

While the above statement, the meaning of which is self-evident, does not appear in any of the standard collections of maxims, it deserves to rank among the most important.[1] It is really included in the maxim that equity looks to the substance and not to the form, if by the word substance we may include the idea of substantial justice. A more careful attention to this principle would have prevented in a large measure the tendency to a decadence of equity into a system of

2. See Sullivan v. Portland etc. R. R. (1876) 94 U. S. 806, 812. In Hammond v. Hopkins (1891) 143 U. S. 224, 250, Fuller, C. J., said: "each case must necessarily be governed by its own circumstances, since, tho the lapse of a few years may be sufficient to defeat the action in one case, a longer period may be held requisite in another, dependent upon the situation of the parties, the extent of their knowledge or means of information, great changes in values, the want of probable grounds for the imputation of intentional fraud, the destruction of specific testimony, the absence of any reasonable impediment or hindrance to the assertion of the alleged rights, and the like."

1. McClure v. Leaycraft (1905) 183 N. Y. 36, 75 N. E. 961, Vann, J., stated the doctrine as follows: "A court of equity will not do an inequitable thing."

mechanical rules which has already been discussed;[2] and if we are to check the tendency to crystallization, and preserve that elasticity of equity which has made it of such great value in Anglo-American law, it must be by a repeated and continued insistence upon its importance.[3]

D. Definition and Classification.

§ 33. Definition of equity.

Of the various definitions of equity which have been attempted, the following is perhaps the one most frequently quoted: "Equity jurisprudence may properly be said to be that portion of remedial justice which is exclusively administered by a court of equity, as contradistinguished from that portion of remedal justice which is exclusively adminstered by a court of common law."[1] As has been pointed out,[2] such an attempted definition does not really define because we have no way of defining a court of equity except in terms of the system of justice which it administers, so that we are no farther along than when we started.

Another attempted definition is that "equity is the correction of law wherein it is defective by reason

2. See *ante* § 15.

3. Still another candidate for a place in the list of maxims should perhaps be suggested, namely, that equity will not render a futile decree; i. e. a decree which is either impossible to be carried out or which may be easily defeated by one of the parties. For example, an equity court will not order a corporation to issue more stock where the corporation can not lawfully issue it. Smith v. Flathead River Coal Co. (1911) 64 Wash. 642, 117 Pac. 475. Nor will an equity court decree specific performance of a contract to convey land either to an infant or by an infant because the infant may disaffirm immediately afterward. Flight v. Bolland (1828) 4 Russell 299, 1 Ames Eq. Cas. 422. Similarly as to contracts to form a partnership or contracts for personal service. Hercy v. Birch (1804) 9 Vesey 357, 360; *post* § 76; De Rivafinoli v. Corsetti (1883) 4 Paige Ch. 264 (contract to sing).

1. 1 Story, Equity Jurisdiction § 25.

2. Phelps, Juridicial Equity § 138.

of its universality.'"[3] This is true as far as it goes but there were other defects[4] of the common law besides its universality which made desirable if not absolutely necessary a corrective and supplemental system.

Perhaps the most satisfactory, tho cumbersome, definition is that given by Phelps[5]: "By juridical equity is meant a systematic appeal for relief from a cramped administration of defective laws to the disciplined conscience of a competent magistrate, applying to the special circumstances of defined and limited classes of civil cases the principles of natural justice, controlled in a measure as well by considerations of public policy as by established precedent, and by positive provisions of law."

§ 34. Classifications of equity.

It must be borne in mind that classification does not exist in the nature of things but only in the human mind which deals with them and therefore that no classification can ever be more than substantially accurate. The best classification is that which enables one most conveniently to grasp the subject as a whole.

The most usual classification is that of exclusive, concurrent and auxiliary jurisdiction.[1] Exclusive jurisdiction includes not only all cases in which the right is purely a creation of equity, such as the right of the *cestui que trust* and the right of the mortgagor to redeem after condition broken, but also those cases where there is a common law right such as a right based upon a contract or tort and equity gives its own peculiar remedy, namely, specific performance of contracts[2] and specific reparation or prevention of torts.

3. 1 Spencer, Equity, 326; Phelps, Juridical Equity, § 139.
4. See *ante* § 5.
5. Phelps, Judidical Equity, § 143.

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1. 1 Story, Equity Jurisdiction, § 35.
2. Talmash v. Muggleston (1826) 4 Law J. Ch. 200, 1 Ames Eq. Cas. 343, 344: "But the jurisdiction of compelling specific performance is not a concurrent jurisdiction."

Concurrent jurisdiction embraces those cases where the right is legal and the remedy is of such a nature as a court of law would give, only that the legal remedy is considered not to be complete or adequate. An illustration of this occurs in the law of suretyship: at common law a surety who has paid the debt can recover contribution from his co-sureties only according to the number of sureties who were liable; in equity, however, he may recover according to the number of sureties who are solvent and within the jurisdiction, thus throwing the burden of possible loss due to such insolvency or absence upon all the other co-sureties equally with the plaintiff.[3]

As its name implies, auxiliary jurisdiction was exercised for the purpose of aiding a party in a suit at common law; this was done either by a bill for discovery[4] whereby his opponent was put on the stand and compelled to testify or by a bill to perpetuate testimony[5] whereby he was enabled to have preserved for a pending or anticipated action at law some evidence which was in danger of being lost. This jurisdiction has been substantially if not entirely wiped out by legislation[6] making parties competent to testify and making provision for the perpetuation of testimony.

A further classification of that part of the exclusive jurisdiction of equity where the primary right is legal but the remedy is exclusively equitable is into affirmative and defensive remedies.[7] Equitable affirmative remedies include specific performance of contract and specific reparation and prevention of torts. Equitable defensive remedies include those remedies given to one who stands substantially in the position of a defendant, to protect him either from repeated suits by the same

3. Brandt, Suretyship and Guaranty, 3rd edition, § 314.

4. See 14 Cyc. 301.

5. See 13 Cyc. 834; and see *post* § 420.

6. See 14 Cyc. 339; 13 Cyc. 835.

7. This is frequently classified as concurrent jurisdiction. See 29 Harv. Law Rev. 552.

person or from suits brought by many persons, or from the loss of a common law defense due to loss of testimoney if the other party delays suing. Bills *quia timet* and bills of peace are thus defensive remedies; reformation and rescission[8] for mistake or fraud may be either affirmative or defensive.

8. These subjects will be treated more fully later.

CHAPTER II.

Specific Performance of Contracts.

A. In General.

§ 35. Scope of the subject.

As previously pointed out, there seems to be only one restriction[1] upon equity jurisdiction that is absolutely binding upon the courts, viz., that the parties to the litigation must be served with process or voluntarily submit themselves to the court's control. If an equity court should give a decree without such a basis, it could be attacked collaterally as being in reality no decree at all.[2] On the other hand, if an equity court should give a decree in violation of the restriction that equity will not give relief in cases where there has always been a plain, adequate, and complete remedy at common law, and the decree should be upheld by the highest appellate tribunal, it would be free from collateral attack.[3] In the field of specific performance, however, this latter restriction has usually been so rigidly observed that anything which may fairly be termed a violation of it has been quite infrequent while in at least one important class of cases, the courts have failed to give specific performance where it was much needed.[4]

1. See *ante* § 8.

2. See 26 Harv. Law Rev. 239; 23 Cyc. 1074; Black, Judgments §§ 224, 263.

3. Furthermore, it has been held that the objection must be made before the defendant enters into his defense at large or it will be considered waived. Brown v. Lake Superior Iron Co. (1889) 134 U. S. 530, 536. And it has even been held that parties are bound by an agreement to have the case tried in equity. Darst v. Kirk (1907) 230 Ill. 521, 82 N. E. 262; 21 Harv. Law Rev. 368.

4. See *post* § 37.

§ 36. The primary right in specific performance.

In the subject of specific performance of contracts there is, with the exception of one class of cases,[1] the common law primary right of contract; i. e. a right which the common law protects by its own appropriate remedy. As we shall see later,[2] however, the vendee under such a contract to convey property as equity will specifically enforce has, as a consequence of the giving of the equitable remedy in that class of cases, a primary property right which is somewhat similar to the right of a *cestui que trust*[3] and to the right of a mortgagor after condition broken.[4]

§ 37. Specific performance not exclusively an equitable remedy in all jurisdictions.

Specific performance is usually considered to be a remedy which one may obtain only in equity and until within the last seventy or eighty years this has been strictly true. Within that time, however, there has gradually grown up in many, perhaps a majority, of jurisdictions in this country, a common law doctrine that in cases of contracts to sell a chattel, the vendor may recover the price altho the title to the chattel has not passed.[1] In some jurisdictions the doctrine is expressly limited to articles not readily salable on the market and therefore as to which it is difficult to fix the market price,[2] and it is not at all unlikely that this limitation will be quite generally adopted wherever the question as to the scope of the doctrine squarely arises.

1. See *post* § 138.
2. See *post* § 83.
3. The vendor under a specifically enforcible contract is frequently referred to as a trustee, but this is not entirely accurate. See *post* § 264.
4. That the analogy to mortgage is not complete see *post* § 92.

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1. See 18 Harv. Law Rev. 298; 20 *id.* 372, 373; Williston, Sales §§ 562-565. And see 17 Mich. Law Rev. 283-293, the Seller's Action for the Price, by John Barker Waite.
2. Williston, Sales § 564.

The cases laying down the doctrine can be traced back to decisions holding that a contract to manufacture and deliver a chattel to one's order was not a contract for the sale of a chattel within the meaning of the seventeenth section of the Statute of Frauds, but a contract for work and labor. Tho this reasoning is now generally admitted to be defective, the decisions themselves allowing recovery of the purchase price have not been overruled.[3]

The doctrine thus limited can be sustained upon the ground that when articles are made according to a special order damages are really an inadequate remedy to the vendor and he should be allowed to shift to the vendee the burden of getting rid of the articles if he does not want them.[4] We thus have the odd situation of the common law itself giving specific performance in a case where equity probably would have refused it, since equity courts have been quite reluctant to exercise their jurisdiction in cases of contracts to sell chattels.[5]

§ 38. Specific performance or specific reparation?

Mr. Langdell has pointed out[1] that while in cases where a court of equity enjoins a threatened tort it gives specific performance of the plaintiff's primary

3. Williston, Sales § 563.
4. Williston, Sales § 565.
5. See *post* § 44.

1. 1 Harv. Law Rev. 355. One of the points in Mr. Langdell's argument was that "a bill will not lie (any more than an action at law will lie) upon an affirmative contract until the contract is broken." Apropos of this it may be pointed out that the modern rule at common law is subject to an exception, namely, the doctrine of allowing an action for anticipatory breach; see 14 Harv. Law Rev. 428-441. And while a bill for specific performance filed before the day set for performance might be demurrable yet if objection is not taken promptly the bill will be good if it transpires that there is a breach on the day, because an equity court may take into consideration everything happening down to the date of the decree, tho a common law court can

right to be free from the tortious interference, the term specific performance of contracts is a misnomer because the utmost that a court of equity can do is to give performance after breach of the contract and therefore after the time the plaintiff is entitled to it. While this is strictly true, yet since the substance of the contract is the performance rather than the time of the performance,— which is usually immaterial[2] where the plaintiff is seeking affirmative equitable relief,—it seems fair enough to call it specific performance.

§ 39. Is there a right to break a contract or only a power?

During the contest that was waged by the chancellors against the common law judges for jurisdiction, the position was taken by the latter that since the only remedy the common law gives on a contract is to make the party who breaks it pay damages, there is therefore a right to choose between performing or paying damages. This position was taken by Lord Coke in Bromage v. Genning:[1] "And Coke said this [specific performance] would subvert the intent of the covenantor since he intended to have his election to pay damages or to make the lease." But the sound doctrine is that in all cases each party to a contract has the *right* to have the other party to perform in specie and that it is merely because the common law is defective in its machinery that it gives only damages; there is no *right* to break a

generally look only to the state of facts existing at the time of action. Furthermore, if X contracts to devise land to Y and X fears that Y will sell and convey the land to a *bona fide* purchaser for value, X may file a bill at once to prevent it tho performance is not due till X's death. See *post* § 89.

2. Time is, of course, sometimes highly important in a specifically enforcible contract, but the party to whom time is thus an important advantage will ordinarily be a defendant who seeks to escape performance because of the delay of the plaintiff. For a discussion of this class of cases see *post* §§ 151, 152.

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1. (1616) 1 Roll R. 368, 1 Ames Eq. Cas. 38.

contract and escape performance, even tho there happens to be the *power*[2] to do so, because of the defective state of the common law.

Even at common law the right to performance in specie is recognized and given effect to indirectly. If the covenantor had been induced by a third person to break his contract with the plaintiff such third person would probably be liable to the plaintiff in an action of tort.[3] If the covenantor had really a right to break his contract with the plaintiff it is difficult to see how the inducing him to break the contract could be tortious.

While, therefore, at common law there is a *power* to elect between performing and paying damages, there is no *right* to do so and equity properly supplements the law by giving specific performance in those cases where the common law remedy of damages is inadequate.

§ 40. Alternative performance—liquidated damages—penalty.

Where the defendant's promise is in the alternative, either to do or to refrain from doing certain acts, or to pay money at his option, equity will not give specific performance[1] because this would be taking away the defendant's option and thus making a contract for the

2. The existence of a power without a right is by no means uncommon; for example, one who has obtained title to property by fraud has the power, tho not the right, to convey it to a *bona fide* purchaser for value without notice and thereby cut off or destroy the equitable property right of the defrauded owner. In such a case the power exists without the right because of the equity doctrine which protects *bona fide* purchasers against equitable rights.

3. In Lumley v. Gye (1853) 2 Ellis and Blackburn, 216, the defendant was held liable for inducing Miss Wagner, a famous singer, to break her contract with the defendant and to sing for the plaintiff. Later cases have not made clear the exact extent of the doctrine. For a collection of cases on the subject, see Bohlen, Torts Cases, 1274; Cooley, Torts, 3rd edition, 592.

1. Moss and Raley v. Wren (1909) 102 Tex. 567, 113 S. W. 739, 120 S. W. 847; Dills v. Doebler (1892) 62 Conn. 366, 26 Atl. 398. See 14 Harv. Law Rev. 613.

parties substantially different from the one into which they entered.

Where, however, the parties contemplate that the payment of money is not performance, but is merely a fixing of liquidated damages or a penalty for non-performance, this does not bar the giving of specific performance,[2] even tho the defendant is willing and offers to pay the amount.

§ 41. The requirement of certainty.

Tho a contract may be sufficiently definite to support a common law action for a breach thereof, it may not be definite enough to induce a court of equity to undertake its specific execution.[1] The reason for this is that an equity court must not only determine that a defendant is in default but must also decide just what specific thing the contract requires him to do.[2] The difference is likely to be brought out in cases where the performance asked for requires long supervision by the court;[3] or where the contract is an oral one.[4] Even where the uncertainty has been caused by the defendant's default, it is still said to be a bar to specific relief.[5]

2. Crane v. Peer (1887) 43 N. J. Eq. 553, 4 Atl. 72; 1 Ames Eq. Cas. 125, note.

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1. Colson v. Thompson (1817) 2 Wheat. 336; "If the contract be vague or uncertain . . . a court of equity will not exercise is extraordinary jurisdiction to enforce it but will leave the party to his legal remedy."

2. See Foster v. Kimmons (1874) 54 Mo. 488, 26 Am. Dec. 661, 663, note.

3. See Buxton v. Lister and Cooper (1746) 3 Atk. 383; 1 Ames Eq. Cas. 47. See *post* §§ 58-62.

4. See Lonergan v. Daily (1914) 266 Ill. 189, 107 N. E. 460. See *post* §§ 134-139.

5. In Stanton v. Miller (1874) 58 N. Y. 192, 200, Mrs. Miller entered into a contract with Stanton whereby in consideration that Stanton would take care of Mrs. Miller during her life, the latter agreed to convey her house and lot after her death to such members of Stanton's family as she might choose. It was held that unless Mrs. Miller had made the designation, specific performance would be refused because of the uncertainty of the person to whom the conveyance was to be made.

Contracts to give security without specifying the property will not be specifically enforced.[6]

B. AFFIRMATIVE CONTRACTS.

I. Contracts for the sale and purchase of interests in land.

§ 42. Hard and fast rule as to inadequacy of damages.

As hitherto explained,[1] it has been the policy of equity not to interfere where the common law remedy has always been adequate. Conceivably the determination of the question of the adequacy of the common law remedy might have been left to the discretion of the court under all the circumstances in the particular case. To a large extent this is true, but there are two hard and fast rules on the subject. One[2] of these is that damages for the breach of a contract for the sale and purchase of any interest in land is always considered inadequate, without regard to the size, value or location of the land or the possibility of getting other land substantially equivalent.[3] The crystallization of this rule is probably due historically to the peculiar respect and consideration which has been accorded to land in the English law;[4] its modern justification is that because there is no open market for land either for seller or buyer, the number of instances where the buyer could get land substantially as satisfactory or where the vendor could make a ready sale to another purchaser is so small as to be negligible.

6. Cole v. Dealham (1862) 13 Iowa 551, 26 Am. Dec. 670, note. See *post* § 51.

1. See *ante* § 8.

2. For the other, see *post* § 48.

3. Gartrell v. Stafford (1882) 12 Neb. 545, 11 N. W. 732.

4. Kitchen v. Herring (1851) 42 N. C. 191: "The principle in regard to land was adopted, not because it was fertile or rich in minerals or valuable for timber, but simply because it was land—a favorite and favored subject in England, and every country of Anglo-Saxon

The originally all equitable relief was given as a matter of grace, specific performance of contracts for the sale and purchase of interests in land has come to be such a usual remedy that it may now be said to be a matter of right, provided the contract is not unconscionable in its terms and there is no misapprehension, surprise, mistake or the exercise of any undue advantage.[5]

Tho most of the decided cases are of contracts for the sale and purchase of a fee simple, the remedy will apparently be given no matter how small the interest; e. g. contracts to give[6] or to renew[7] a lease, or to assign[8] a lease, or even the good will[9] of a lease, have been specifically enforced. So have contracts for the sale of easements[10] and for the sale of mere possessory interests[11] and for the digging of stone.[12] Whether a contract for the sale of standing timber is to be treated in this respect as an interest in land can hardly be said to be settled. The better view probably is that if the trees are to be severed at once they are to be treated as chattels.[13]

origin. Our constitution gives to land pre-eminence over every other species of property; and our law, whether administered in courts of law or of equity gives it the same preference. Land, whether rich or poor, cannot be taken to pay debts until the personal property is exhausted. Contracts concerning land must be in writing. Land must be sold at the Court House, must be conveyed by deeds duly registered, and other instances too tedious to mention. The principle is, that land is assumed to have a peculiar value, so as to give an equity for a specific performance, without reference to its quality or quantity."

5. Losee v. Morey (1864) 57 Barb. 561, 564.

6. Clark v. Clark (1875) 49 Cal. 586. :

7. Gorder v. Pankonin (1909) 83 Neb. 204; 119 N. W. 499.

8. Crosbie v. Tooke (1833) 1 Mylne & Keen 431, 1 Ames Eq. Cas. 135.

9. See Bennett v. Vansyckel (1855) 4 Duer (N. Y.) 462.

10. Coy v. Minneapolis & St. Louis R. R. (1902) 116 Iowa 558, 90 N. W. 344.

11. Johnson v. Rickett (1855) 5 Cal. 218.

12. Nelson v. Bridges (1837) 1 Jurist 753. As to contracts to sell expectant estates, see 24 Harv. Law Rev. 410.

13. See Stuart v. Pennis (1895) 91 Va. 688, 22 S. E. 509, and cases cited; 36 Cyc. 554. See also 13 Col. Law Rev. 748.

§ 43. Some exceptional cases.

In Blake v. Flatley[1] it was held that since specific performance was a matter for the discretion of the court, and since the selling price of the land was only $55 and the plaintiff had shown no special reason for wanting that particular piece of land, specific performance should be denied. It is doubtful whether the case will be followed.

In Hazelton v. Miller[2] it was held that the fact that the plaintiff purchased and contracted to sell the land to a third person showed that the plaintiff had an adequate remedy at law and hence was not entitled to specific performance. This holding is objectionable not only because specific performance in land contracts has become a matter of right but also because it deprives the third person of specific performance; furthermore, it subjects the plaintiff to an action for damages at the suit of the third person, and while it is possible that he will be able to collect from the original vendor an equivalent amount, such a result seems somewhat inconsistent with the desire of equity to prevent a multiplicity of suits.

Where, however, the plaintiff had been acting as agent for X in making the contract of purchase with the defendant and then X purchases directly from the defendant, the plaintiff is not entitled to specific performance because all he is seeking is compensation for his services as agent and for that the common law remedy is adequate.[3]

1. (1888) 44 N. J. Eq. 228, 10 Atl. 158, 14 Atl. 128.

2. (1903) 33 Wash. Law Rep. (D. C.) 217; the case was affirmed but on a different point, in (1905) 202 U. S. 71. See 18 Harv. Law Rev. 625; 36 Cyc. 552; Paddock v. Davenport (1890) 107 N. C. 710, 717, 12 S. E. 464.

3. Thweatt v. Jones (1898) 87 Fed. 268; Marthinson v. King (1906) 150 Fed. 48.

II. Contracts relating to property other than land.

§ 44. Ordinary chattels.

In the vast majority of contracts to sell chattels the common law remedy of damages is adequate and therefore equity will not give specific performance. Unfortunately this has led to the statement[1] that the general rule is that equity will not give specific performance of contracts for the sale and purchase of chattels, as if there was something in the nature of such property which influenced courts of equity against giving relief; whereas the general rule[2] really is that equity will give relief if the common law remedy has not always been adequate. This misstatement of the true rule has no doubt had something to do with the conservatism of equity in regard to enforcing such contracts. As has been already stated,[3] in many jurisdictions it now possible for a vendor of chattels to get specific performance at law in cases where he would probably be refused relief in equity.

Wherever the chattel is readily procurable in the open market, damages are obviously adequate because the purchaser can with the amount of money received from the vendor as damages for the breach, together with the purchase price he would have paid to the vendor, buy elsewhere just as advantageously;[4] consequently, unless there is some other circumstance in the contract which renders the common law remedy inadequate, specific performance will be denied. All the ordinary

1. See 36 Cyc. 554.

2. Richmond v. Dubuque & Sioux City R. R. Co. (1871) 33 Iowa 422, 480.

3. See *ante* §37.

4. Or, if the buyer refuses to take the goods the seller can sell the rejected goods and if he is compelled to sell for less, he can collect the difference from the buyer. Jones v. Newhall (1874) 115 Mass. 244.

agricultural and manufactured products fall within this class; e. g. cotton,[5] cattle,[6] lumber,[7] whiskey,[8] bar room fixtures,[9] fruit business, and stock in trade.[10]

Where the subject matter of an entire contract is partly ordinary chattels and partly land, equity will give specific performance of the whole contract.[11]

§ 45. Defendant vendor execution proof or insolvent.

Where one who has made a contract to sell ordinary chattels is execution proof[1] it is obvious that damages are an inadequate remedy to the vendee, especially if he

5. Block v. Shaw (1906) 78 Ark. 511, 95 S. W. 806.
6. McLaughlin v. Piatti (1865) 27 Cal. 451.
7. Dorman v. McDonald (1904) 47 Fla. 252, 36 So. 52.
8. Langford v. Taylor (1901) 99 Va. 577, 39 S. E. 223.
9. Meehan v. Owens (1900) 196 Pa. St. 69, 46 Atl. 263.
10. Carolee v. Handelis (1898) 103 Ga. 299, 29 S. E. 935.
11. Leach v. Fobes (1858) 11 Gray 506. McGowin v. Remington (1849) 12 Pa. 56, 15 Harv. Law Rev. 318. See 36 Cyc. 564. It is sometimes said that this is done in order to avoid multiplicity of suits; that is, that instead of giving specific performance as to the land only and thus compelling the plaintiff to sue at law as to the chattels, equity settles the whole affair in one suit. 15 Harv. Law Rev. 318. It is difficult to see, however, that either a court of law or a court of equity would be justified in thus splitting an entire contract into two choses in action. It seems clear, therefore, that the real alternative to specific performance of the whole contract is no specific performance at all. And since damages are inadequate as to part of the subject matter of the contract, it is difficult to see how it can be an adequate remedy in an action brought upon the whole contract, except, perhaps, where the land was an insignificant part of the subject matter.

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1. The distinction taken in the text between a defendant being execution proof and insolvent seems to have been entirely overlooked. Apparently the only case on the subject using the phrase "execution proof" is Hendry v. Whidden (1904) 48 Fla. 268, 37 So. 571, and in that case relief was denied. The failure to grasp the distinction is probably the reason for the uncertainty of the law on the subject. While there are many dicta and a few decisions favoring the plaintiff, they have been vigorously assailed. See Williston, Sales §§ 143-144; 18 Harv. Law Rev. 454; 1 Col. Law Rev. 267. It is possible that a defendant may be either execution proof and not insolvent, insolvent and not execution proof or he may be both insolvent and execution proof. For example,

has paid a large part or all of the purchase price and at least in cases where the defendant has become execution proof after the payment of the money equity should give either specific performance[2] or declare an equitable lien on the property for the amount paid by the buyer.

Where the vendee is not execution proof but is insolvent, a somewhat similar situation is presented, and it would seem that the solution should be the same unless there are other creditors who object; the defendant himself is certainly in no position to object;[3] other creditors may properly object on the ground that to give the buyer specific performance or an equitable lien is in the nature of a preference[4] and is a violation of the maxim that equality among members of a class is equity.[5] Where the defendant is also execution proof, however, so that no creditor is able to enforce payment, it is doubtful whether the other creditors can legitimately object to the buyer's getting specific performance or an equitable lien. If so, the objection must be based upon the ground that altho they are unable to enforce payment now they might be able to do so later and that

if the exemption is $3000 worth of property and A agrees to sell B $800 worth of cattle and A has only $2000 worth of property all together, with no obligations except to B, A is execution proof but not insolvent. If, however, he has $10,000 worth of property and owes $15,000, he is insolvent but not execution proof. And if he should have $2900 worth of property and owe $4,000 he is both execution proof and insolvent. That one may sell or give away his exempt property, see 18 Cyc. 1446.

2. See Parker v. Garrison (1871) 61 Ill. 251, 1 Ames Eq. Cas. 44; McNamara v. Home Land Co. (1900) 105 Fed. 202. In these cases the defendant was probably execution proof as well as insolvent, but only insolvency is mentioned.

3. Cf. the enjoining of a trespass because of the defendant's insolvency; see *post* § 201. The enjoining of a trespass does not, of course, infringe upon the rights of the defendant's creditors.

4. In one instance the defendant himself may probably raise a valid objection on the ground that specific performance would subject him to proceedings in involuntary bankruptcy.

5. See Williston, Sales § 144. In determining solvency under the Bankruptcy Act the test is whether the debtor's assets—both exempt and not exempt—are sufficient to pay his debts.

giving specific performance would tend to decrease their chances of future recovery.

§ 46. Chattels having sentimental value—unique chattels.

Where a chattel has a sentimental value to the purchaser specific performance will be given because in such a case damages are obviously inadequate. Heirlooms[1] constitute the stock illustration of this class of chattels. In slavery times, slaves, epecially those who did household work, frequently became chattels with a sentimental value.[2]

The same reasoning applies to all articles of a unique or rare value which cannot be duplicated. The most common illustrations are valuable works of art,[3] especially if old.

To the same extent that equity will give specific performance, it will give specific relief against one who wrongfully detains a chattel of sentimental or unique value. The common law remedies of detinue and replevin are inadequate, frequently for two reasons. In the first place, it is open to the defendant in some jurisdictions to pay the value and keep the chattel just as if trover had been brought.[4] Even in jurisdictions where this option is not allowed, the chattel may be so secreted[5] as to be very difficult if not impossible for the sheriff to find it. A court of equity being able to command the defendant himself to produce the chattel can thus deal with the situation more effectively than a

1. See Pusey v. Pusey (1684) 1 Ver. 273, 1 Ames Eq. Cas. 39, note, where the equity court commanded the defendant to deliver to the plaintiff an ancient horn which had time out of mind gone with the plaintiff's estate. It was a case of wrongful detention, not of a contract to sell, but the principles underlying it are the same. For further cases see 36 Cyc. 557.

2. Sartar v. Gordon (1835) 2 Hill, Equity (S. C.) 121.

3. Lowther v. Lowther (1806) 13 Ves. 95.

4. See 14 Cyc. 1459.

5. See Scarborough v. Scotten (1888) 69 Md. 137, 14 Atl. 704.

common law court. Instances in the books where the plaintiff has thus been awarded specific reparation for the tortious detention of a chattel of sentimental value are more numerous that cases where specific performance has been given.[6]

§ 47. Unique chattels continued—patents and copyrights.

In its very nature a patent is property of a unique character which is not procurable on the open market by the purchaser or easily salable by the vendor; hence specific performance of contracts with reference to a patent will be given.[1] The same reasoning applies to a copyright[2] and to such patented articles[3] as are procurable only from the defendant.

§ 48. Specific performance to the seller—mutuality.

Where it is the buyer who is asking specific performance of a contract to sell land or chattels of unique or sentimental value, it is usually quite easy to see that damages are not an adequate remedy. But suppose the seller asks for specific performance; i. e. asks that the buyer be compelled to pay the full purchase price and take the property; can not the buyer properly insist that damages at law will be adequate? May he not argue that altho there is no exact duplicate of the property, there are other persons to whom the vendor may sell? The answer to this is that in perhaps the large

6. Since specific performance cases in this field are so rare, it is quite common to cite the specific reparation cases instead. See 36 Cyc. 557, note 21.

1. Corbin v. Tracy (1867) 34 Conn. 325. An agreement to assign future improvements on patent rights has also been specifically enforced. Reece Folding Machine Co. v. Fenwick (1905) 140 Fed. 287; 19 Harv. Law Rev. 542.

2. Thombleson v. Black (1837) 1 Jur. 198.

3. Adams v. Messenger (1888) 147 Mass. 185, 17 N. E. 491, 1 Ames Eq. Cas. 50.

majority of cases damages would not be adequate because there being no open market for such property, it may be very difficult for the vendor to find other buyers.[1] But this question is seldom considered;[2] it is a hard and fast rule that if the property is such that the court would have given specific performance to the buyer if he had sued for it, the seller may have specific performance.[3] This is usually referred to as the doctrine of mutuality.[4] But it is to be noted that it is mutuality as a basis for *giving* relief and must be carefully distinguished from the doctrine of lack of mutuality as a ground for *denying* relief; that doctrine will be discussed later in the chapter.[5] In order to avoid confusion the two doctrines will be called respectively "mutuality" and "lack of mutuality."

On principle the doctrine of mutuality is difficult to justify.[6] It is an illustration of the tendency of equity courts to limit the scope of discretion and widen the field of fixed rule. Historically it is perhaps traceable to a notion on the part of the courts that in thus giving the vendor specific performance they were

1. In reply to this it might be suggested that the vendor of land might sell it at public auction and collect the deficiency from the purchaser; but it might well happen that the purchaser could raise the money to take the land and yet not be able to meet a judgment for damages for the deficiency.

2. In a few states the vendor of land must show that damages would be inadequate; Porter v. Frenchman's Bay & Mt. Desert Land and Water Co. (1892) 84 Me. 195; 24 Atl. 814; 36 Cyc. 566, note 53.

3. Adams v. Messenger (1888) 147 Mass. 185, 1 Ames Eq. Cas. 50 (unique chattels); Adderley v. Dixon (1824) 1 Simons & Stuart 607, 1 Ames Eq. Cas. 58; Cheale v. Kenward (1858) 3 DeGex & J. 27 (shares of stock).

4. Kenney v. Nexam (1822) Maddock & Geldart 355: "I consider this case, therefore, strictly a case of mutual remedy so as to entitle the vendor to a bill for specific performance."

5. See *post* § 173.

6. It is sometimes suggested that the vendor of land is entitled to specific performance because of the doctrine of "equitable conversion." This is, however, putting the cart before the horse. Pooley v. Budd (1855) 14 Beav. 34, 44. See *post* § 448.

following out the principle that equality is equity;[7] it seems, however, a misapplication of the maxim, because that maxim properly applies to members of a class; it cannot reasonably be contended that the vendor and vendee are members of a class.[8]

It has been argued that the vendor's right to get specific performance without inquiring into the adequacy of his common law remedy "has nothing to do with any question of mutuality. The vendor, from the time of the bargain, holds the legal title as security for the payment of the purchase money, and his bill is like a mortgagee's bill for payment and foreclosure of the equity of redemption."[9] It is not clear whether this refers to the vendor's *right* to hold as security or to his *obligation* so to hold. If it is the former that is meant then it may be answered that in the case of contracts to sell ordinary chattels without provision for credit, it is equally true that the vendor cannot be compelled to part with the title or possession of the goods till he has been paid; but this does not mean that he can recover the price in equity.[10] If, however, the argument refers to the vendor's obligation to hold the property, it amounts substantially to the following:[11] "The sellers' action for specific performance is really in the nature of an action to foreclose the equitable right of the buyer to specific performance. In other words, whether the

7. See *ante* § 25; Lewis v. Lechmere (1721) 10 Modern 503.

8. The rule of mutuality is also applied to cases where part performance of an oral contract is held to take the case out of the operation of the Statute of Frauds. If the purchaser's going into possession is held to entitle him to specific performance, it also entitles the vendor. See *post* § 132. Query: Would the doctrine of mutuality be applied where a chattel is not unique and is of sentimental interest to the buyer only? Or where a chattel is procurable only from the vendor? Such cases are obviously not likely to arise.

9. Professor J. B. Ames, 3 Col. Law Rev. 1, 12.

10. In some jurisdictions he may, under some circumstances, recover the price at law. See *ante* § 37.

11. Professor W. W. Cook in 6 American Law and Procedure, 183, arguing that the doctrine of mutuality is unnecessary.

seller asks for specific performance or seeks to foreclose the equity by a sale, the object of the suit is the same, to put an end to the situation created by equity in making the seller a trustee[12] for the buyer, and permitting this relation to continue even after the time set for performance in the contract itself." There seem to be two defects in this argument. If for some reason[13] the purchaser could not enforce specific performance against the vendor the latter is not a "trustee"[14] or fiduciary and therefore there is no "situation " to put an end to; and yet the vendor may get specific performance. Secondly, in any case if all that the vendor wishes is to get rid of his fiduciary obligation with reference to the land, he can do that just as effectually by getting a common law judgment for damages which would merge the contract, as he can by obtaining a decree for specific performance. Of course the mere fact that the vendor's remedy of specific performance is somewhat similar to a mortgagee's bill for foreclosure is no reason in itelf why the vendor should be given such a remedy.[15]

12. For objections to calling the vendor a trustee see *ante* § 36; and *post* § 83, note 6.

13. For example, if the purchaser has been guilty of fraud on the vendor or if only the vendor signed the memorandum required by the Statute of Frauds.

14. See *supra* note 12; 31 Harv. Law Rev. 273, note 12.

15. Professor Ames' argument continues: "This view is confirmed if we consider the position of a vendor who has conveyed before the time fixed for payment. He is now a creditor, just as if he had sold goods on credit, and there is no more reason why he should have a bill in equity than any other common law creditor. No case has been found in which a bill has been sustained under such circumstances. The case of Jones v. Newhall (1874) 115 Mass. 244 is a solid decision against such a bill." It would seem that the fact just mentioned does not tend to show that there is no positive rule of mutuality but merely that the rule is not applied where the vendor can get a judgment for the purchase money at law, the procedure peculiar to equity being here unnecessary. When the purchaser sues for specific performance he must do so in equity even if he has paid the full purchase price because he wants a decree *in personam* that the vendor convey—something he can not get at law. If the vendor sues

III. Specific performance given because damages at law are conjectural.

§ 49. In general.

In contracts concerning land or chattels of sentimental or unique value or where the seller has a legal monoply, damages are inadequate primarily because the buyer wants the specific thing and no amount of damages would be a satisfactory substitute. There is, however, the additional reason that it is difficult if not impossible to get an accurate estimate of the amount of damages; this latter reason is an ample one in itself for giving specific performance as will be seen in the following sections.

§ 50. Annuities—dividends against bankrupt's estate.

A contract for the sale of an annuity is specifically enforcible not because of any unique quality or sentimental value but because of the difficulty of computing damages. If an action is brought at common law for breach, the market value of the annuity will be calculated according to the recognized mortality tables[1] which are based on the expectancy of life of the average human being. The plaintiff, whether seller or buyer, may properly insist that he had in mind not the life of the average person but the life of the particular in-

for specific performance without having conveyed, the suit must be in equity because, *inter alia*, the common law does not regard the unaccepted tender of a deed of land as entitling the vendor to the purchase price; and an equity decree is necessary to compel the purchaser to accept the conveyance and also to protect both parties by making the performance of each conditional upon the simultaneous performance by the other. No such conditional decree is necessary if the vendor has conveyed, and the remedy at law is therefore quite adequate.

1. New York v. North American Life Insurance Co. (1880) 82 N. Y. 172; 20 Am. & Eng. Encyc. of Law, 2nd edition, 884.

dividual. It is obvious that damages in such a case would be conjectural.[2]

Similarly, in a contract to sell dividends against a bankrupt's estate, the uncertainty of the percentage of dividends which the estate will pay makes damages at law so conjectural and uncertain and therefore inadequate that specific performance will be decreed to either seller or buyer.[3] The same reasoning prevails in contracts to sell the promissory notes of a maker who is insolvent but not bankrupt.[4]

§ 51. Contracts to give security.

A contract to give a mortgage on land would be specifically enforcible merely because an interest in land[1] is involved. But contracts to give a mortgage on specific property of any kind will be specifically enforced[2] for the reason that damages are conjectural. If the debtor should remain solvent the damages would be only nominal; on the other hand, if the debtor should later become insolvent, the damages would vary from a small sum in cases of slight insolvency up to the whole amount of the debt in cases of total insolvency. If the creditor were denied specific performance he would be compelled to rely entirely on the solvency of the debtor, the very thing which he wished to avoid. In these cases the equitable maxim properly applies

2. Withy v. Cottle (1833) 1 Simons & Stuart 174, 1 Ames Eq. Cas. 57.

3. Adderley v. Dixon (1824) 1 Simons & Stuart 607, 1 Ames Eq. Cas. 58.

4. Gottschalk v. Stein (1888) 69 Md. 51, 13 Atl. 625; Cutting v. Dana (1874) 25 N. J. Eq. 265.

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1. See *ante* § 42.

2. Hermann v. Hodges (1873) 43 Law J. Ch. 192, 1 Ames Eq. Cas. 61; Triebert v. Burgess (1857) 11 Md. 452. It is of course necessary that the contract should be definite in its terms so that the court may be reasonably sure of carrying out the intentions of the parties. See *ante* § 41; 22 Harvard Law Review 309. A contract to give security without naming any specific property will not be enforced by equity.

that equity regards that as done which was agreed to be done.[3]

In England, a contract to pledge personal property is treated in the same way as a contract to give a mortgage and apparently upon the same reasoning.[4] In this country weight of authority is *contra*,[5] on the ground that since a pledgee without possession is usually not protected against creditors of the pledgor, it would be giving greater effect to a contract to pledge than if the pledge had actually been made but possession retained by the pledgor.[6]

§ 52. Contracts to insure.

If an insurance company contracts to insure and then refuses to issue the policy, equity will give specific relief by compelling the issuance of the policy[1] Here, again, damages are inadequate because conjectural. If there is no loss, no damages at all could be recovered at common law; if there is a loss, the damages may be any amount up to the full amount of the promised policy.

3. See *ante* § 20. In most cases where the creditor seeks relief equity will not require the formality of the defendant's executing a formal mortgage but will give complete justice by declaring an equitable lien on the property and ordering a sale of the property to satisfy the lien. See *ante* § 24. Occasionally, however, the debtor is compelled to execute a formal mortgage; Hermann v. Hodges (1873) 43 Law J. Ch. 192. See Sprole v. Whayman (1855) 20 Beav. 607.

4. Martin v. Reid (1860) 11 C. B. N. S. 730.

5. See Copeland v. Barnes (1888) 147 Mass. 388; *In re* Sheridan (1899) 98 Fed. 406.

6. It might be suggested, in answer to this and in support of the English rule, that there is less likelihood of fraud in cases of contracts to pledge than in cases where the pledge is actually made but possession is retained.

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1. Tayloe v. Merchants' Fire Ins. Co. (1850) 9 Howard 390, 1 Ames Eq. Cas. 59; Hebert v. Mutual Life Insurance Co. (1882) 12 Fed. 807. Where the insurance company reserves the power to cancel the policy the right to specific performance before loss is defeated because equity will not give a futile decree; see *ante* § 32, note 2.

The case which usually arises is after a loss, either partial or total; if the loss covers only a part of the policy equity will decree the issuance of the policy and then upon the principle that when equity once takes jurisdiction of a case it will settle up the whole matter,[2] it will give a money decree for the amount of the loss instead of sending the plaintiff to a court of law to sue upon the plicy.[3] If the loss is large enough to cover the whole amount of the policy, the issuance of the policy would be a mere matter of form, so the only decree given is for the payment of the amount of the policy.[4]

The above discussion shows the situation at the time when equity took jurisdiction. It is well settled now that at law the plaintiff can recover the same damages on a contract to insure that he would have been able to recover if the policy had been issued;[5] and besides, since parties to a suit are now made competent witnesses the plaintiff will usually have no difficulty in proving his contract in a common law court; and since he can usually demand a jury trial at common law, while in equity a jury is merely for the purpose of enlightening the conscience of the chancellor and within his discretion, most of the suits of this sort are today brought in common law courts. But as already stated, wherever equity has once taken jurisdiction on the ground that relief at common law is inadequate, it will generally not relinquish the exercise of that jurisdiction merely because later the relief at law becomes adequate; hence the jurisdiction of equity in cases of contracts to insure will still be exercised.[6]

2. See *ante* § 24.

3. Security Fire Ins. Co. v. Kentucky Marine & Fire Ins. Co. (1869) 70 Ky. 318.

4. Commercial etc. Ins. Co. v. Union etc. Ins. Co. (1856) 19 Howard 318.

5. Baile v. St. Joseph Ins. Co. (1881) 73 Mo. 371. See 15 Harv. Law Rev. 575.

6. Carpenter v. Mutual Co. (1846) 4 Sandf. Ch. 408.

§ 53. Contracts to deliver in installments.

If a seller contracts to deliver property which fluctuates greatly in value, the deliveries to be made in installments covering a relatively long period of time, equity will probably give specific performance because damages would be conjectural.[1] If the value is comparatively stable and the time relatively short specific performance is likely to be refused, as a matter of discretion.[2] The mere fact that delivery is made in installments is not a sufficient basis for equity jurisdiction.[3]

IV. To avoid irreparable injury to the plaintiff.

§ 54. In general.

Specific performance is sometimes given where the damage which the plaintiff will suffer from a breach of contract by the defendant is of such a character that damages can not be a satisfactory substitute, e. g., where a breach will cause serious injury to the plaintiff's business. Here the basis for the exercise of equity jurisdiction is not merely that it is difficult to estimate damages but that even if estimated accurately, it

1. Taylor v. Neville, cited in Buxton v. Lister (1746) 3 Atk. 383, 1 Ames Eq. Cas. 47; and see Livesley v. Heise (1904) 45 Oregon 148, 76 Pac. 952.

2. Fothergill v. Rowland (1873) Law Reports 17 Eq. 132, 1 Ames Eq. Cas. 111 (contract for coal which had three years to run). In this case Jessel, M. R. said: "To say that you cannot ascertain the damage in a case of breach of contract for the sale of goods, say in monthly deliveries extending over three years . . . is to limit the power of ascertaining damages in a way which would rather astonish gentlemen who practice on what is called the other side of Westminster Hall." This remark does not, however, meet the point; of course a court of law has the power to ascertain the damage, however conjectural, if the plaintiff sues at law for relief; the real question is as to the adequacy of such a remedy, not the power to give it.

3. It must be borne in mind that while the length of time over which the installment contract is to run tends to make damages at law conjectural, the increased amount of supervision required might tend to influence an equity court *not* to give relief. See *post* § 58.

would be totally out of proportion to the injury suffered. The principle involved is thus closely akin to that underlying the cases where specific performance is given of contracts with reference to chattels having a unique character or sentimental value. Some of these cases may also be classified under the *quia timet*[1] jurisdiction of equity.

§ 55. Contracts to exonerate.

A contract whereby A in consideration of B's becoming a surety either for A or for a third person, agrees to save B harmless from the consequences of entering into such an obligation is usually and properly called a contract to exonerate.[1] Such contracts are specifically enforcible[2] at least when the plaintiff can show that to rely upon his right of subrogation[3] or upon his right of reimbursement against his principal debtor would entail great hardship upon him; e. g., where the raising of the cash to pay off the obligation would seriously cripple his business, and where obviously his other remedies would be inadequate. In such a case the plaintiff would get a decree that the defendant pay the obligation and thus save the plaintiff harmless; such a decree may be enforced against the defendant's property just as any other money decree.[4] Since equity has *quia timet* jurisdiction, i. e.

1. See *post* Chap. VII.

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1. It is sometimes called a contract of indemnity; but the terms 'indemnity' and 'indemnify' are ambiguous because they are also used to designate the right of a surety to reimbursement after he has paid any part. See *post* §§ 451, 453.

2. Comes Ranelaugh v. Hayes (1683) 1 Vernon 189, 1 Ames Eq. Cas. 64.

3. The right of subrogation is the right of a surety, who has paid the whole amount for which he is liable, to the assignment of all the rights which the creditor had the moment before payment. See *post* § 450.

4. Such a decree may even be enforced in other jurisdictions by suing thereon, just like suing on a judgment. See Bullock v. Bullock (1895) 57 N. J. L. 508, 31 Atl. 1024.

jurisdiction to prevent threatened wrongs, it is not necessary that the plaintiff wait till he is actually sued by the creditor. Furthermore, it should be pointed out that the plaintiff's right is solely against the defendant his promisor; such a contract does not affect the creditor's rights in any way.[5]

The right, in absence of an express contract, of a surety to exoneration against his principal debtor and to proportional exoneration against his co-sureties will be discussed in a later chapter.[6]

§ 56. Necessary articles procurable only from the defendant.

Where the defendant has practically a monoply of articles which are necessary to the plaintiff's business, the plaintiff may have specific performance even tho the chattels can not be said to be unique in character. For example, when a defendant agreed to furnish the stone from his quarry for the erection of a church building but refused to go on after the building was partly completed, specific performance was granted because of the impossibility of matching the stone from other quarries in the vicinity.[1] In such cases to deny the plaintiff relief would result in inflicting an injury which would be incommensurable with any amount of damages which the plaintiff might get in an action at law.[2] It has been held that if the plaintiff would be compelled to go a long distance for similar necessary articles he is entitled to specific performance.[3]

5. See *post* § 453.
6. See *post* § 453.

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1. Rector of St. David v. Wood (1893) 24 Oreg. 396, 34 Pac. 18; 36 Cyc. 560. In Donnell v. Bennett (1883) Law Rep. 22 Ch. Div. 835, 1 Ames Eq. Cas. 114 the defendant was enjoined from delivering the article (fish refuse) to any one else then the plaintiff.

2. Gloucester Isinglass & Glue Co. v. Russia Cement Co. (1891) 154 Mass. 92, 27 N. E. 1005 (fish skins).

3. The Equitable Gas Light Company of Baltimore City v. The Baltimore Coal Tar and Manufacturing Co. (1884) 63 Md. 285, (coal tar not procurable elsewhere in Baltimore). And see the suggestion

§ 57. Shares of stock.

Contracts for the sale and purchase of shares of stock in private corporations have been dealt with differently in different jurisdictions. By what is believed to be the weight of authority, however, specific performance will be denied only where there is an open market for the stock so that its value can be easily ascertained and so that the purchaser may be able to buy elsewhere.[1] In England the tendency is toward a more liberal rule,[2] very little attention being paid to whether the stock is readily procurable on the market. On the other hand, in some states in this country there is a tendency toward the stricter rule that mere inability to procure the stock on the market is not a sufficient ground for specific performance but that the purchaser must show some particular and peculiar need for it in specie;[3] e. g. that he needs it to give him a majority of the stock and thus a controlling interest in the corporation; in such a case a failure to get specific performance would result in such an injury that damages at best could be only a lame substitute.[4]

made by Lord Hardwicke in Buxton v. Lister (1746) 3 Atk. 383, 1 Ames Eq. Cas. 47, 49, as to timber for ship building. Of course the mere fact of convenience of location is not enough because that may be considered in estimating damages. Paddock v. Davenport (1890) 107 N. C. 710, 12 S. E. 464 (timber trees near a watercourse).

1. Frue v. Houghton (1882) 6 Colo. 318; 36 Cyc. 560. In Selover v. Isle Harbor Land Co. (1904) 91 Minn. 451, 98 N. W. 344, the stock had never been sold and hence had no market value whatever; specific performance was decreed. See 9 Col. Law Rev. 635; 2 Harv. Law Rev. 153-154.

2. Duncuft v. Albrecht (1841) 12 Sim. 189, 1 Ames Eq. Cas. 55; Poole v. Middleton (1861) 29 Beav. 646.

3. Barton v. DeWolf (1883) 108 Ill. 195; Gilbert v. Bunnell (1904) 86 N. Y. Supp. 1123. See 36 Cyc. 562, note 38.

4. O'Neil v. Webb (1898) 78 Mo. App. 1; 13 Mich. Law Rev. 609, 610. In Humfray v. Fothergill (1866) Law Rep. 1 Eq. 567 the court decreed specified performance of a contract whereby a right of pre-emption was given of partnership shares to the other members of the partnership.

In regard to government bonds or stocks,[5] specific performance will not be decreed anywhere, since they are always for sale on the open market.

V. Contracts for continuous performance.

§ 58. In general—difficulty of supervision.

In most of the cases discussed thus far in this chapter, the acts which the plaintiff has asked to have specifically performed have been such that their performance would occupy only a brief period of time; e. g. to execute a conveyance, to deliver a chattel, to pay money. In some cases, however, courts are asked to decree specific performance of contracts where the act to be done by the defendant will take a long period of time, such as contracts to put up a building, contracts to repair, etc. Tho there is language in some of the decisions[1] to the effect that there is lack of jurisdiction in such cases, the decisions themselves show that these cases do not differ in principle from those that have been already discussed; jurisdiction exists if the defendant is within control of the court, and will be exercised if the remedy at law is inadequate, and the inconveniences attending its exercise are not too great.[2] It must be borne in mind that while the remedy of specific performance is no longer a matter of grace but of right, yet on the other hand it is

5. Cud v. Rutter (1719) 1 P. Wms. 570, 1 Ames Eq. Cas. 54. Nor will equity compel delivery by one who wrongfully detains such bonds: Dumont v. Fry (1882) 12 Fed. 21.

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1. Blackett v. Bates (1865) Law Rep. 1 Ch. App. 117: "The form of the decree itself shows the want of jurisdiction. It does not and could not decree a specific performance . . . ." Beck v. Allison (1874) 56 N. Y. 366, 1 Ames Eq. Cas. 70: "As I understand the English cases, the power of enforcing the specific performance of contracts for repairs is not now exercised by courts of equity there, and there is no authority for its exercise by the courts of this State. This being so, a court of equity had no jurisdiction . . . ."

2. See 8 Col. Law Rev. 670.

not automatically given like assumpsit or replevin, but is given only in the exercise of judicial discretion.[3] If the court orders a defendant to do an act which will require a long period of time, such as the building of a house, the court must of course see that it is performed, in order that the decree be not nugatory. This difficulty of supervision in case specific performance should be granted is weighed against the hardship of the plaintiff in case specific performance should be refused. If the hardship of the plaintiff would be very great the court will, and should, undertake a more difficult task of supervision than where the hardship on the plaintiff would be relatively slight.[4] It is a matter then, of expediency, of the balancing of convenience, to be decided upon all the circumstances of the particular case and is incapable of being reduced to a rule.

§ 59. Contracts to build.

Where the defendant has agreed to erect a building on the plaintiff's land, damages at law are usually adequate; in fact the remedy at law may be even more satisfactory than specific performance,[1] because the plaintiff can usually find some one else who will do the work substantially as well and it is much more agreeable to have a builder who works willingly than one who works under compulsion. It may happen, however, that it is impossible or very difficult for the plaintiff

3. Shubert v. Woodward (1909) 167 Fed. 48; 21 Harv. Law Rev. 210.

4. Wilson v. Furness Ry. Co. (1869) 9 Eq. Cas. 28, 33: "It would be monstrous if the company, having got the whole benefit of the agreement, could turn around and say, 'This is a sort of thing which the court finds a difficulty in doing and will not do.' Rather than allow such a gross piece of dishonesty to go unredressed the court would struggle with any amount of difficulties in order to perform the agreement."

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1. See Flint v. Brandon (1803) 8 Vesey 159, 1 Ames Eq. Cas. 69, 70.

to get another builder; in such a case, if the hardship on the plaintiff would be very great, specific performance should be decreed.[2]

Where the defendant has agreed to erect a building on his own land we have a very different state of affairs from the case where the building is to be put upon the plaintiff's land. In Mayor of Wolverhampton v. Emmons[3] the plaintiff city having several lots to sell sold part of them to defendant with a view of enchancing the value of the lots retained; it required the defendant as a part of the consideration for the lots purchased by him a covenant that he would within a certain time erect houses thereon, according to certain specifications. The hardship on the plaintiff if specific performance is denied in such a case is obvious; the damage suffered by it due to the failure to erect the houses is purely conjectural, a matter of speculation; and it is impossible to have some one else erect the houses, because they were to be erected on the defendant's land and to go on the land without his consent would be a trespass; furthermore, even if the defendant should consent to the plaintiff's thus erecting the buildings, unless the consent also amounts to an

2. In early times Chancery was quite liberal in granting specific performance of contracts to build on plaintiff's land. 10 Col. Law Rev. 574, 1 Ames Eq. Cas. 68 note 4. A most interesting case is that of Holt v. Holt (1694) 1 Eq. Abridg. 274, placitum 11; the contract to build was made by the defendant with the plaintiff's father, who died leaving the plaintiff as his heir. The reasoning of the court in giving specific performance to the heir is not given but apparently the sole ground is that a contract by Y to erect a building on X's land creates in X a property right to have the land thus benefitted, which property right passes to the heir. See *post* § 83.

3. Law Rep. (1901) 1 K. B. Div. 515, 1 Ames Eq. Cas. 76; the court gave specific performance. For other cases where specific performance was decreed of contracts to erect buildings on defendant's property, see 1 Ames Eq. Cas. 78 note. It is sometimes suggested that in order that the plaintiff should succeed it is necessary that the land be obtained by the defendant from the plaintiff. See 36 Cyc. 583. While this element is usually present it is not essential. See 16 Harv. Law Rev. 293. Where the court gives relief it should appoint as overseer an architect who has expert knowledge.

agreement to pay therefor, the plaintiff could not ordinarily afford to do so because the buildings would become the property of the defendant.[4]

§ 60. The public interest a possible element.

Usually, in exercising their discretion in determining whether it will be expedient to give relief, a court takes into consideration and balances only the interests of the contracting parties. But in some cases there is a public interest to be considered either in favor of or against the granting of specific performance and it may be sufficiently heavy to turn the scale. In Hood v. North Eastern Ry. Co.[1] the defendant had contracted to keep on the plaintiff's estate a first class station for the purpose of taking up and setting down passengers travelling along the said roadway. Specific performance was decreed, whatever public interest there was being in favor of granting relief and damages being clearly inadequate. So, in Joy v. St. Louis,[2] where the defendant railway company had contracted to allow the plaintiff to use its tracks through Forest Park, the defendant company to have control of the running of plaintiff's trains and to keep in order the tracks and terminal facilities, the court in giving relief took into consideration the public interest in favor of having the contract performed.

On the other hand, in Powell Duffryn Coal Co. v. Taff Vale Ry.[3] where an Act of Parliament had given

4. Still further, since what the plaintiff wants is the general result of increase in the value of his own land, much less supervision is required than if the building is for the plaintiff's own use.

1. (1869) Law Rep. 8 Eq. 666; 1 Ames Eq. Cas. 82.

2. (1890) 138 U. S. 1. See also Prospect Park & Coney Island R. R. Co. v. Coney Island & Brooklyn R. R. (1894) 144 N. Y. 152, 39 N. E. 17, 1 Ames Eq. Cas. 83, where the defendant street car company had agreed to make connection with the plaintiff's steam railroad trains; the public interest was an element which helped the plaintiff to get his decree. See 8 Col. Law Rev. 670.

3. (1874) Law Rep. 9 Ch. App. 331, 1 Ames Eq. Cas. 79. It is to be noted that the plaintiff's right was statutory, not contractual;

to the plaintiff railway company the right to use a portion of the defendant railway company's tracks, specific performance of this obligation was refused; the remedy at law was clearly inadequate; but there was a great practical difficulty of supervision involving the fixing of schedules; hence, whatever public interest there was was against specific performance because it would tend to increase the danger to the public to attempt to require defendant's servants to work the train signals and would also probably decrease the speed of the defendant's trains. The tendency in this country at present is to vest the regulation of such matters in an administrative commission which can handle the matter much more effectively than can an equity court.

§ 61. Contracts to repair.

A contract whereby a landlord agrees with his tenant to repair the demised premises is very similar to a contract to erect a building on the plaintiff's land; the remedy at law is usually more satisfactory than specific performance because work done under compulsion is not likely to be as well done as that which is done voluntarily. As the court expressed it in Flint v. Brandon,[1] "In some respects the legal remedy is better than any this court can give; for the plaintiff recovering and having the disposition of the money, may perform the work in such a manner as he thinks proper; whereas, if specific performance is decreed a question may arise whether the work is sufficiently per-

possibly this made the court more reluctant to give relief. See 28 Harv. Law Rev. 110. In Harper v. Virginian Ry. Co. (1915) 76 W. Va. 788, 86 S. E. 919, the decree that defendant operate its depot according to the terms of its promise was expressly limited to such time as such operation remained consistent with its duties to the public. See 29 Harv. Law Rev. 552; 14 Col. Law Rev. 612.

1. (1803) 8 Vesey 159, 1 Ames Eq. Cas. 69. It is not uncommon to find statements that covenants to repair will never be enforced. See Ross v. Union Pacific Ry. Co. (1863) 1 Woolworth 26.

formed. The jury may also take into consideration any injury to him by not having performed at the commencement of the lease; but this court can only decree specific performance."

But here, as in building contracts, the circumstances may be such that damages would be so inadequate that specific performance would be decreed. If the lease is short in duration and the repairs to be made by the landlord are relatively very expensive, specific performance would be necessary to protect both parties. At common law the tenant could not get as damages the value of the improvements because the law court could not give a conditional judgment and therefore could not require that the tenant use the money in making the improvements on the land; the measure of damages in a common law court is the difference between the value, for the period of the lease, of the premises without the improvements, and the value, for the same period, which the premises would have had if the landlord had made the promised improvements. Unless the tenant can find a site in the neighborhood substantially as good, it is clear that damages are inadequate and specific performance should be decreed unless the difficulty of supervision is very great.[2]

§ 62. Contracts for personal services.

A contract to render personal services[1] will not be

2. In Jones v. Parker (1895) 163 Mass. 564, 1 Ames Eq. Cas. 73, the landlord had contracted to heat and light the demised premises during the term of the lease; specific performance was decreed. Since the fixtures would become the property of the landlord and all that the tenant wanted was a general result, less certainty and less supervision were required.

1. While building and repair contracts require personal services, they are not strictly contracts for personal service but for a building; it is usually immaterial to the plaintiff how the result is attained.

affirmatively[2] enforced against the party who agreed to perform the services, for one or more of three different reasons. First, where the services are not unique and the plaintiff can easily get some one else to perform them; here equity will not give specific performance for the simple reason that the remedy at law is adequate. Second, where the remedy at law is inadequate either because the services are unique or because of some other circumstances. Here equity will not exercise its jurisdiction because personal services rendered under compulsion are not satisfactory; e. g., supposing that the defendant has unique ability as a gardener, or draftsman or butler; if an order of court is necessary to compel him to work, it is not likely that his services will be worth much to his employer under such circumstances. Third, in the United States, where the thirteenth amendment has forbidden involuntary servitude,[3] we have a limitation not merely upon the exercise but upon the existence[4] of equity jurisdiction; at least where the services to be rendered are those of manual labor, through long hours and for a considerable period of time, an order of court requiring defendant to perform would probably be in violation of the United States Constitution.[5]

2. For a discussion of negative or indirect enforcement see *post* §§ 72-81.

3. See 8 Harv. Law Rev. 172, 173. See also Gossard Co. v. Crosby (1906) 132 Iowa, 155, 163, 109 N. W. 483: "Any system or plan by which the court could order or direct the physical coecrion of the laborer would be wholly out of harmony with the spirit of our institutions, and his imprisonment would take away his power to make specific performance. Even if such authority existed its exercise would be undesirable. If the relation of employer and employee is to be of value or profit to either it must be marked by some degree of mutual confidence and satisfaction, and when these are gone and their places usurped by dislike and distrust, it is to the advantage of all concerned that their relations be severed."

4. See *ante* § 8.

5. See Clark's Case (1821) 1 Blackf. (Ind.) 122; in denying specific performance to the employer against a menial servant the court distinguished the case of apprentices on the ground of the

The employee is likewise unable to get specific performance of the contract for services against the employer. In most cases damages are an adequate remedy because all that the employee wants is money. In the exceptional case where the employee desires something besides money, e. g., experience, it will usually be more satisfactory to get it elsewhere than with an unwilling employer.[6]

VI. Miscellaneous cases.

§ 63. Contracts to lend money.

Tho a contract to give a mortgage to secure a loan of money or other debt already contracted is specifically enforcible by the creditor,[1] a contract to lend money cannot be specifically enforced by either party, even tho the loan is to be with security.[2] In most cases damages at law are adequate because there is ordinarily an open market for the lending and borrowing of money upon good security. If the loan were to be made without security or with insufficient security, the borrower may find it difficult to secure the loan elsewhere and damages therefore would be inadequate. But in such a case specific performance should be refused because the equity court has no means of insuring that the lender will be repaid at the maturity of the debt. This is sometimes expressed by saying that there is lack of mutuality of performance.[3]

parental relation involved and the case of soldiers and sailors on the ground of the public interest in the national safety. See 36 Cyc. 579, 580.

6. See Shubert v. Woodward (1909) 167 Fed. Rep. 48 where affirmative relief was sought by the manager of a theater against the employer. In this case as well as in most cases where the employee has sued the employer the denial of relief has been unnecessarily placed upon the ground of lack of mutuality of remedy. 36 Cyc. 581. For a discussion of lack of mutuality of remedy see *post* §§ 174-180.

1. See *ante* § 51.

2. Western Wagon & Property Co. v. West (1892) 1 Ch. Div. 271, (suit by borrower); Rogers v. Challis (1859) 27 Beav. 175, 1 Ames Eq. Cas. 61 (suit by lender).

3. See *post* § 181.

There is one state of facts in which a court of equity might conceivably give the borrower relief; viz., where he has contracted to give ample security but because of a sudden money panic happening after the contract to lend was made, it is now impossible or very difficult to borrow money elsewhere.[4]

§ 64. Awards—contracts for arbitration or valuation.

If a contract is made to submit a matter to arbitration or valuation and the arbitrators are appointed and make an award, the award is treated just as if it were a contract between the parties; e. g., if the award is to convey land, equity will give specific performance of it;[1] if it is to pay money, the proper remedy is at law.[2]

But if after the agreement to arbitrate or to value is made, one of the parties refuses to go on and appoint an arbitrator or valuer, equity will not interfere. The reason for such refusal is that the acts expected of the arbitrators and valuers involve so much discretion that it is unlikely that a command by a court of equity to appoint an arbitrator or valuer would bring about the desired result. Equity will not render a decree which is so likely to be futile. In Agar v. Macklew[3] counsel said: "Suppose the court were to decree that the defendant should name an arbitrator how could it compel the execution of that decree? Or even if the arbitrator were named, how could it compel that

4. Of course relief should not be given if it would cause great hardship to the lender. There are apparently no decisions on the point.

1. Hall v. Hardy (1733) 3 Peere Wms. 186. Wood v. Griffith (1818) 1 Swanst. 43.

2. The common law remedy was debt.

3. (1825) 2 Simons & Stuart 418, 1 Ames Eq. Cas. 67. The court was asked to refer the valuing to a master in chancery but refused to do so. See also Darbey v. Whittaker (1857) 4 Drew. 134.

arbitrator to act? Could it compel the arbitrators to agree upon a price?[4] It is the constant doctrine of the court never to interfere in cases where it can not enforce the acts which it is called upon to direct." Nor will the court itself determine the question because this would be making a new contract for the parties.

Where, however, the agreement to arbitrate or submit to valuers is a comparatively unimportant part of the contract, which is otherwise specifically enforcible, specific performance will be given of the whole contract, the court itself deciding the question or referring it to a master in chancery.[5] So, when the plaintiff has gone to great expense in reliance upon the agreement so that to deny relief would cause great hardship to the plaintiff this may be enough to turn the balance of convenience and cause the court itself to decide the question and to give specific performance.[6]

§ 65. Contracts to form a partnership.

A contract to enter into a partnership at will or for an indefinite period of time will not usually be specifically enforced because such a partnership may be immediately dissolved and the equity decree thus rendered futile.[1] But if by the contract the plaintiff was entitled to the conveyance of an interest in land or in a unique chattel from the defendant, specific performance will be decreed of the contract especially if denial of

4 Formerly juries were rather severly treated to compel them to agree on a verdict.

5. Coles v. Peck (1884) 96 Ind. 333; 30 Cyc. 578. Compare this holding with the decisions giving specific performance of entire contracts to sell land and ordinary chattels; see *ante* § 44.

6. Strohmeier v. Zappenfield (1877) 3 Mo. App. 429. Where the referees appointed are willing to act but the defendant refuses to allow them to come upon the land to make the valuation, it seems that equity may enjoin such prevention; More v. Merst (1821) Maddock & Geldart 26. As to indirect enforcement of affirmative promises generally see *post* §§ 72-81.

1. Clark v. Truitt (1899) 183 Ill. 239, 55 N. E. 683.

relief would work great hardship upon the plaintiff.[2]

A contract to enter into a partnership for a fixed time will not ordinarily be specifically enforced for the same reason that specific performance will not be given for personal services.[3] No court would undertake to compel the partners to work together as such.[4]

C. NEGATIVE CONTRACTS.

§ 66. In general.

Hitherto in this chapter the discussion has been limited to the enforcement of promises to do something as distinguished from promises to refrain from doing. In this subdivision of the chapter the latter class of cases will be treated. As a matter of brevity and convenience a promise to do will be spoken of as an affirmative promise or contract or stipulation, while a promise to refrain from doing will be referred to as a negative promise or contract or stipulation.

Where specific performance of negative promises

2. Whitworth v. Harris (1866) 40 Miss. 483 (land); Sutterthwait v. Marshall (1872) 4 Del. Ch. 337 (patent). Since the promise to convey an interest in the land or in the patent was in itself specifically enforcible, the fact that there was also a promise to enter into a partnership was not a sufficient reason for denying specific performance of the entire contract. Cf. giving specific performance of an indivisible contract to sell land and ordinary chattels; see *ante* § 44.

3. See *ante* § 62; 36 Cyc. 579. In England v. Curling (1843) 8 Beav. 129 the court gave a decree declaring the rights of the parties to specific performance of a fourteen year contract, remarking, however, that it was impossible to make persons who will not concur, carry on a business jointly for their own common advantage.

4. Some other cases of interest where specific performance of affirmative contracts has been decreed are as follows: Agreement by X with his intended wife that he would substitute her as the beneficiary in a mutual benefit life insurance policy; Pennsylvania Co. v. Wolfe (1902) 203 Pa. 269, 52 Atl. 247, 16 Harv. Law Rev. 67. Agreement to receive specific chattels in satisfaction of a debt; Very v. Levy (1851) 13 How. 345. Agreement to vacate a judgment; Deen v. Milne (1889) 113 N. Y. 303, 20 N. E. 861; 36 Cyc. 568.

is given, it will be of course by a negative decree; this negative decree is called an injunction.[1]

The negative promise may be the only promise made by the defendant or it may be coupled with an affirmative promise.

I. Defendant's promise entirely negative.

§ 67. Covenant not to sue—circuity of action.

Where the only promise made by the defendant is a negative one, the question whether equity will give specific performance or not depends upon the adequacy of the common law remedy. Where the defendant has contracted never to sue the plaintiff on a certain cause of action, equity will give specific performance by a perpetual injunction[1] in order to avoid circuity of action and the expense and delay incident thereto. By circuity of action is meant that by litigation at common law the parties would arrive at the same position in which they were when they started. For example, suppose A owes B $100 and contracts never to sue him; then he does sue in violation of his promise; the contract never to sue is no answer to the action at law under strict common law pleading; but B could at once bring an action against A for breach of his contract never to sue and recover as damages the amount which A had recovered in the first litigation and costs. The result is that except for the loss of court costs and attorney's fees the parties are where they started.

If the promise was not to sue on the cause of action for a certain time, equity will give specific

1. While the word "injunction" means primarily nothing more than command, its secondary meaning is a forbidding or prohibiting. It is in this secondary sense that the term is used in equity unless qualified by the word "mandatory" in which case the meaning is exactly the opposite, namely, a command to do something. See *post* § 70.

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1. Rue v. Meirs (1887) 43 N. J. Eq. 377, 12 Atl. 369. In some states this may be set up at law as an equitable plea, and in code states it may be set up in the answer.

performance by a temporary injunction till the time has expired.[2] In such a case if the common law court should allow B to recover back the full amount of the judgment there would be circuity of action as in the case of the promise never to sue. If it should not allow the recovery of the full amount but of some lesser sum, the common law remedy would be inadequate because of the difficulty of estimating the amount of damages suffered in such a case.

§ 68. Promise not to compete with the plaintiff.

Where one sells out a business—whether commercial or professional—and agrees as a part of the consideration not to engage in competition with the buyer, equity will give specific performance to the seller,[1] provided, of course that the contract is not illegal as being in unreasonable restraint of trade.[2] The equitable remedy is given here because of the impossibility of estimating accurately the damages at law, the value of the good will of a business being conjectural.[3]

2. This cannot be availed of at law because a judgment at law must be unconditional and final; see Sutherland, Damages 4th Ed. § 144.

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1. Andrews v. Kingsbury (1904) 212 Ill. 97, 72 N. E. 11 (sale of newspaper); Williams v. Williams (1818) 2 Swanst. 253 (sale of coach business); Whitaker v. Howe (1841) 3 Beavan 383 (sale of attorney's business). That the agreement not to compete may be implied from the circumstances see Palmer v. Graham (1850) 1 Par. Sel. Cas. (Pa.) 476, 478.

2. As to the test of reasonableness in restraint of trade, see Nordenfelt v. Maxim Co. (1894) A. C. 535. Where the contract is valid at common law equity will usually give relief in such cases as a matter of course; but in Thomas v. Borden (1908) 65 Leg. Int. (Pa.) 404 the court refused to enjoin the defendant from practicing painless dentistry in Philadelphia tho the contract was valid at law, because equity should not protect a right to a monoply in the means of relieving human suffering. For a criticism of this case see 22 Harv. Law Rev. 145; 8 Col. Law Rev. 586.

3. Palmer v. Graham (1850) 1 Par. Sel. Cas. (Pa.) 476, 478.

The same reasoning has been applied where the promise not to compete with the plaintiff is based upon considerations other than the sale of a business.[4]

§ 69. Promise not to reveal trade secrets.

If an employee agrees, as a part of the consideration for his employment, not to divulge the trade secrets of his employer, equity will give specific performance of such a contract,[1] damages being wholly inadequate because of the difficulty of estimating them and usually also because of the irreparable injury which would result. In the absence of an express understanding it would usually not be difficult to show an implied promise[2] to that effect, especially if the relation between the employer and employee was one of personal trust and confidence. As we shall see later,[3] even if there were no contract of employment at all, equity would enjoin one who had obtained a trade secret and threatened wrongfully to divulge it, on the ground of enjoining a threatened tort to property where the plaintiff's loss would be irreparable in money.

4. Altman v. Royal Aquarium Society (1876) L. R. 3 Ch. Div. 228 (agreement that lessee should have sole right to sell various articles on lessor's premises); Jones v. North (1875) L. R. 19 Eq. 426 (vendor of stone agreeing not to complete with vendee for the business of the B corporation).

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1. Peabody v. Norfolk (1868) 98 Mass. 452; Fralich v. Despar, (1894) 165 Pa. St. 24, 30 Atl. 521.

2. Salomon v. Hertz (1885) 40 N. J. Eq. 400, 2 Atl. 379, 1 Ames Eq. Cas. 128. Thum Co. v. Tloczynski (1897) 114 Mich. 149; 72 N. W. 140, 22 Cyc. 843. In McCall Co. v. Wright (1909) 117 N. Y. Supp. 775, there was no express agreeemnt not to divulge trade secrets but there was an express provision that the defendant was not to enter the services of a competitor during a specified period; the defendant abandoned the contract and was about to act as the president of a rival firm; tho his services were not unique (see *post* § 81) he was enjoined from entering the services of the competing concern because he had become acquainted with the plaintiff's secret formula and business methods. See 10 Col. Law Rev. 559, 575.

3. See *post* § 229.

§ 70. Covenant restricting the use of land—"mandatory injunction."

Promises not to do some particular act on a piece of land usually occur in the deed of conveyance to the premises and are therefore spoken of as covenants.[1] Not only will equity enjoin[2] the threatened breach of such a covenant on the ground that an interest in land is involved, but it will compel the defendant to undo what he has done provided that relief is asked for promptly. The most common illustration is the building restriction contract, whereby the grantee agrees not to build nearer the street than a certain line; in one case the defendant having erected two houses with bay windows projecting three feet beyond the line, the court compelled him to remove them.[3] Such a decree is usually called a mandatory injunction; the term is not literally accurate because an injunction is ordinarily used to mean a command not to do a thing[4] while the word 'mandatory' would at most add emphasis; the phrase is in constant use, however, to mean an affirmative decree, quite the opposite of its literal significance.

§ 71. Miscellaneous cases of negative promises.

In the preceding sections are the most common cases of contracts where the only promise sought to be

1. Tho orginally "covenant" was used synonymously with "promise," later usage tends to restrict its meaning to promise under seal. The term covenant in this connection is no longer significant because (1) in the United States a deed of conveyance is executed only by the grantor, (2) in many states seals have been abolished and (3) the right of the grantor is treated as a technical property right rather than as a contract right. See *post* § 94.

2. Rankin v. Huskisson (1830) 4 Simons 13 (not to erect any building); Steward v. Winters (1847) 4 Sandf. Ch. 628 (not to use premises except for dry goods business); Dickerson v. Grand Junction Canal Co. (1852) 15 Beav. 261 (not to dig a well).

3. Manners v. Johnson (1875) L. R. 1 Ch. Div. 673, 1 Ames Eq. Cas. 130. This case was unusual in granting affirmative relief before the final hearing.

4. See *ante* § 66 note 1.

enforced is negative. Equity will generally give relief,[1] however, upon exactly the same principles which underlie the giving of specific performance of affirmative contracts.

II. Defendant's undertcking partly affirmative.

§ 72. Lumley v. Wagner.

When the defendant has made two promises, one negative and the other affirmative, various questions may arise. In the leading case of Lumley v. Wagner[1] the defendant, Johanna Wagner, a singer of great ability, agreed to sing at the plaintiff's theater for a certain number of nights and not to sing elsewhere during that period. The defendant later refused to sing for the plaintiff and entered into a contract to sing at a rival theater. The plaintiff asked the court to decree specific performance of the negative promise by enjoining the defendant from singing at any other theater than the plaintiff's; the desired relief was given. The case was severely criticized at the time but there is a tendency in recent years to acquiesce in the decision.

It is to be observed that there were the following elements in the case:

1. See 22 Cyc. 846. For example, Howard v. Nutkin (1724) 2 Peere Wms. 226 (not to ring the town bell); McEachern v. Colton (1902) A. C. 104, 15 Harv. Law Rev. 748 (not to assign a lease). In Stone etc. Union v. Russell (1902) 38 N. Y. Misc. 513, specific performance of a contract not to employ non-union labor was denied on the ground that while the contract was not invalid as an unreasonable restraint of trade, its tendency in that direction was such that an equity court might properly exercise their discretion in denying specific relief. See 16 Harv. Law Rev. 215.

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1. (1852) 1 De Gex, Macnaughten & Gordon *604; 1 Ames Eq. Cas. 93. It is not entirely clear from the report of the case whether, at the time the plaintiff filed his bill, the breaches were actual or merely threatened. Apparently the affirmative promise had been broken and a breach of the negative was impending. The point is, however, immaterial.

1. The affirmative promise was not specifically enforcible.

2. There was no separate consideration for the negative promise.

3. The negative promise was incidental to the affirmative.

4. Both promises had been broken by the defendant.

5. The plaintiff had been damaged by the breach of the affirmative promise and would have been damaged still further by a breach of the negative promise.

6. There was no mutuality of remedy; i. e. the defendant could not have had specific performance against the plaintiff of the plaintiff's affirmative promise.

7. There was an express negative promise.

8. The defendant was a unique person.

Each of these elements will be discussed separately and the importance of each one determined.

§ 73. (1) Affirmative promise not specifically enforcible.

The affirmative promise in Lumley v. Wagner was not specifically enforcible because it was a promise to render personal services.[1] If it had been specifically enforcible there would have been a clear case for giving the relief sought. Wherever the affirmative promise is itself specifically enforcible it would seem to follow necessarily that a promise not to do something inconsistent with the performance of the affirmative promise would be specifically enforcible, since the latter is included in the former.[2] In Donnell v. Bennett,[3]

1. See *ante* § 62.

2. For example, since a contract to devise land is specifically enforcible, it follows that the promisor may be enjoined from conveying the land to any one else; see *post* § 89.

3. (1883) 22 Ch. Div. 835, 1 Ames Eq. Cas. 114. In Sevin v. Deslandes (1860) 30 Law J. [N. S.] Eq. 457 the owner of a ship which had been chartered was held entitled to enjoin the charterer from doing anything inconsistent with the charter party.

the defendant agreed to sell to the plaintiff, a manure manufacturer, all parts of fish not used by defendant in his business of fish curer and fish smoker for two years and not to sell to any other manure manufacturer during that time. The plaintiff sought and obtained an injunction against the defendant's selling to another manufacturer. Tho the point is not discussed in the case it seems clear that the plaintiff could have obtained a decree of specific performance of the affirmative promise, because of the difficulty of obtaining the fish refuse elsewhere;[4] since the promise was not to produce fish refuse but merely to sell to the plaintiff what he should produce, there would have been no difficulty about supervision.

§ 74. (2) No separate consideration for the negative promise.

In Lumley v. Wagner there was no separate consideration for the negative promise; if there had been a separate consideration so as to make the concontract a divisible one, the case would have been a clear case for equitable relief, the remedy at law for the breach of the negative promise being inadequate. Such a case would not differ materially from the cases where the only promise made by the defendant was negative.[1] It is arguable that the decision in Dietrickson v. Cabburn[2] may be rested on this ground. In that case the defendant, a patent medicine proprietor, had agreed to

4. See *ante* § 56.

1. See *ante* § 66. In Daly v. Smith (1874) 38 New York Super. Ct. 158, the contract provided that if the defendant should refuse to fulfill her part, and should attempt to perform at any other theater before the termination of her agreement with the plaintiff, the plaintiff might restrain her from so performing, on payment to her during such restraint a sum equal to one quarter of the salary to be paid to her under the contract. As the court pointed out, the stipulation could not confer jurisdiction, but it made plain and simple the way to exercising it.

2. (1846) 2 Phillips 52, 1 Ames Eq. Cas. 108.

employ the plaintiff, an extensive vender of patent medicines, as wholesale agent for 21 years, to supply him with such medicines as he should order at 40% discount and not to supply any other agent or dealer at a larger discount than 25%. The plaintiff asked for and obtained specific performance of the negative promise. If it can be truthfully said that the consideration for the negative promise was the promise to act as agent for the defendant, the buying and selling of the medicines being a separable part of the transaction, there would seem to be as clear a case for specific performance as if the negative promise had been the only one made by the defendant, the common law remedy being inadequate because of the difficulty of estimating damages.

It is to be observed that altho the contract of employment as agent could not be specifically enforced by either party because it involved personal services[3] and a confidential relationship, there was no valid objection to enjoining defendant from selling to others at a higher rate of discount than 25% because the injunction would be dissolved as soon as plaintiff ceased to act as agent.

§ 75. (3) The negative promise incidental to the affirmative—criticism of Lumley v. Wagner.

The negative promise in Lumley v. Wagner was incidental to the affirmative; i. e. the main thing the plaintiff wanted was that the defendant should sing for him, but he also wished to be protected against the probabilty of business being attracted away from his theater to that of a rival by her singing at the latter's theater. And the plaintiff wanted specific performance of the negative not only because it would prevent his rival from thus increasing his share of the theater patronage but in order to bring pressure to bear upon the defendant to perform her affirmative undertaking. In

3. See *ante* § 62.

other words, performance of the negative is being sought not merely for its own sake but in order to bring about performance of the affirmative which the court will not directly enforce.[1] One of the criticisms of the decision in Lumley v. Wagner has been aimed at this point. It has been urged[2] that it is an unwarranted extension of equity jurisdiction because the court is acquiring jurisdiction by attempting to do indirectly what is cannot do directly. If the court had no jurisdiction to compel the performance of the affirmative promise directly, the criticism would be sound, because jurisdiction should not be acquired by indirection.[3] But equity *does* have jurisdiction to enforce directly a promise to render personal service, except that in the United States the thirteenth amendment must not be violated; the reason it does not exercise its jurisdiction is the difficulty of supervision, the interference with personal liberty, and the uncertainty that the plaintiff would get what he bargained for if equity should give an affirmative decree. The difference between a contract to render personal service and a contract to convey land is only a difference of degree, because in either case it is possible for the defendant to defeat the decree by disobeying it and merely remaining in jail if committed for contempt. The difference is not one of principle but one of the practical administration of justice. In the conveyance case the act called for is the simple, mechanical one of executing a deed, while in the case of the personal service contract such as that in Lumley v. Wagner the acts to be done by the defendant are so continuous and complicated that equity keeps its hands off. When it is said that equity cannot make one

1. See *ante* § 62.

2. For other criticisms see 8 Harv. Law Rev. 172 and 6 Col. Law Rev. 82, (commented on in 19 Harv. Law Rev. 476).

3. There is, however, a recent tendency to take jurisdiction by consent; 21 Harv. Law Rev. 368, 446.

sing or write a book[4] or paint a picture, it is not meant that equity does not have jurisdiction to make the decree, but that the practical difficulties are so great that equity, as a matter of the decent administration of justice, will not exercise its jurisdiction.

Since the difficulty in Lumley v. Wagner was one merely affecting the exercise of jurisdiction and not the existence of jurisdiction, it would seem that the court properly did what it could to bring about performance of the affirmative promise; in enjoining a breach of the negative there was, of course, no difficulty about supervision.[5]

§ 76. (4) Both promises had been broken by the defendant.

In Lumley v. Wagner the defendant had either broken or threatened to break both her affirmative and her negative promise. Suppose, however, that her affirmative promise had been of such a nature—e. g. to sing only on alternate nights—that it would have been possible for her to carry out her affirmative promise and also to break the negative promise by singing at the rival theater on the free nights. If by the terms of the contract the consideration were divided so that

4. Considering the number of books that have been written while in prison, an affirmative decree in such a case might conceivably be sometimes effective.

5. Sometimes the term "incidental" is used with an entirely different meaning. In South Wales Ry. Co. v. Wythes (1854) 5 DeGex, M. & G. 880, the defendants had agreed to build some railway stations and to give a bond for £50,000 to secure the performance of the contract. The plaintiff argued that altho the agreement to build was too indefinite to be specifically enforced, he was entitled to specific performance of the agreement to give the bond, on the authority of Lumley v. Wagner. In denying relief the court puts its decision on the ground that the agreement to give the bond is a mere incident to the rest of the contract. What the court evidently meant was that a decree ordering the giving of the bond would have very slight, if any, tendency toward bringing about the building of the stations and that the failure to give the bond did not cause any damage beyond that caused by the failure to build the stations.

she was to be paid so much for singing for the plaintiff and so much for not singing elsewhere, it would be just as if the only promise made were negative, and since damages were conjectural, equity would certainly enjoin wherever Lumley v. Wagner is followed because it is a much stronger case for the plaintiff;[1] and a court that refused to follow Lumley v. Wagner might consistently give relief because there would be little or no hardship on the defendant. Even if there is no such apportionment of the consideration, the fair inference is that a part of the total compensation she receives is for her promise not to sing elsewhere, and an injunction should be issued just as in Lumley v. Wagner; it would be conditional, of course, upon the plaintiff being willing to employ the defendant and would be dissolved if the plaintiff failed to fulfill his part of the agreement.[2]

§ 77. (5) Plaintiff damaged by both breaches.

In Lumley v. Wagner the plaintiff had been damaged by the breach of the affirmative promise and would have been damaged further by the breach of the negative. Suppose the negative promise—not to sing elsewhere—had been broken in such a way that the plaintiff would suffer no damages thereby: for example, suppose that the defendant instead of contracting to sing at a rival theater in London had contracted to sing in a city so far distant that such singing could not damage the plaintiff; would the plaintiff in such a case be entitled to an injunction? This question arose in

1. In Daly v. Smith (1874) 38 New York Super. Ct. 158 the consideration was apportioned, but the defendant had broken both promises, so that the decision is not squarely in point. Where the plaintiff has contracted for only a part of the defendant's time and there is no express negative promise, it would take quite strong evidence to warrant a court in implying such a promise. See *post* § 80.

2. Apparently there are no decisions yet on the points discussed in this section.

De Pol v. Sohlke[1] where there was a contract made by a dancer in Cleveland similar to the contract in Lumley v. Wagner; later the dancer abandoned the contract and began dancing at a New York theater. An injunction to restrain her from dancing in New York was asked for and refused on the ground that since the plaintiff had no establishment in New York there was no damage to his business.[2] It might be argued that if it was likely that, as a result of the desired injunction, the defendant would return to Cleveland and perform her contract with the defendant, the equity court would be justified in giving relief; but it is at least doubtful whether a court would go so far; it would and should require a case of very extreme hardship on the plaintiff if it did give such relief.

§ 78. (6) Lack of mutuality of remedy—lack of mutuality of performance.

Another current criticism of Lumley v. Wagner is that there is no mutuality of remedy; that Miss Wagner could not have gotten specific performance and therefore the plaintiff should not be allowed to have it.[1] There are two answers to this; the first is that if Lumley had in violation of his contract hired another singer—a rival—in the place of Miss Wagner and refused to let Miss Wagner sing and the circumstances were such that

1. (1867) 30 N. Y. Super. Ct. 280.

2. In Lumley v. Wagner the decree apparently was not limited to enjoining the defendant from singing for the plaintiff's rival nor was it even limited to enjoining her from singing elsewhere in London. But in Daly v. Smith, *supra*, the court expressly limited its decree to the city of New York, so that the defendant in that case was free to work any where else. It would seem that the injunction in these cases should always be limited to such territory as would furnish reasonable protection to the plaintiff's business. In the baseball world it may be necessary to enjoin the player from playing in rival ball clubs anywhere else in the United States. See American Association Baseball Club v. Pickett (1890) 8 Pa. C. C. R. 232.

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1. See Professor Ames' article in 3 Col. Law Rev. 7, 8.

damages would not be an adequate remedy for the breach in the hiring of another[2] to take her place, it is quite probable that equity would enjoin Lumley from employing the other singer in her place, altho it would not undertake to compel him to let her sing. In other words, since under similar circumstances Miss Wagner might probably have obtained an injunction against Lumley, it is fair to say that there was no lack of mutuality of remedy.[3]

2. Assuming for the present that Lumley had expressly agreed not to hire another to take Miss Wagner's place. As to the necessity of an express negative see *post* § 80.

3. While Miss Wagner could not get specific performance of Lumley's affirmative promise, neither could he get specific performance of her affirmative promise. Tho there are a few cases which raise or suggest the question converse to that in Lumley v. Wagner, the problem has not been very carefully analyzed. In Welty v. Jacobs (1898) 171 Ill. 624 the defendant, theater owner, had agreed to furnish the theater, light, heat, music, stage hands etc., and the plaintiff, a theatrical manager, agreed to put on a play for seven consecutive nights, commencing December 29, 1895. The defendant later contracted with N, a rival theatrical manager, to put on the same play at the same time. The plaintiff made the tactical blunder of asking not only for an injunction against the defendant's allowing N to use the theater but also against the defendant's refusing to furnish to the plaintiff light, heat, music, etc. during the period. As the court properly pointed out, the second request was really for affirmative relief and the dissolution of the injunction by the lower court was affirmed chiefly on the ground that the defendant could not have compelled the plaintiff to perform affirmatively. In Peto v. Brighton etc. Ry. Co. (1863) 1 Hemming & Miller 468, in which the plaintiff had contracted to build a railway for the defendant, the plaintiff made the same tactical blunder of asking also for affirmative relief and lost probably because of thus clouding the issue. In Montgomery Light & Power Co. v. Montgomery Traction Co. (1911) 191 Fed. 657, the defendant town had agreed to buy from the plaintiff company exclusively for fifteen years all the electrical current it might need. The temporary decree given is really affirmative, tho the court talks about enforcing negative contracts. In Brett v. East India and London Co. (1864) 2 Hemming & Miller 404 the court says the case is the converse of Lumley v. Wagner, but in reality it is not, because only affirmative relief is asked for (contract of service as broker).

In at least two cases which were apparently the converse of Lumley v. Wagner relief has been given to the employee. In Turner v.

The other answer to the criticism is that the doctrine of lack of mutuality of remedy is subject to so many exceptions that there is practically nothing left of the doctrine.[4]

Hampton (1906) 30 Ky. Law Reporter 179, 97 S. W. 761, the plaintiff, having been engaged as a school teacher, was prevented from entering upon her duties by the trustees who had hired another teacher. The report of the case says that the plaintiff obtained a "temporary injunction under which she taught the school pursuant to the contract." The Court of Appeals held that "injunction was the proper remedy, as in no other way could the plaintiff obtain adequate relief." While it is not clear, apparently the court granted only negative relief. If so, the decision—tho criticized in 7 Col. Law Rev. 204, 205—may be rested on the authority of Lumley v. Wagner, if it was of very great importance to the plaintiff to get teaching experience, even tho the breach of the implied negative, i. e. the hiring of the other teacher, caused her no separable damage. If the trustees had been under an official duty to have the school taught by some one, it might have been argued that giving an injunction really amounted to giving specific performance of the affirmative promise; in a theater case there is no such embarrassment tho an injunction might, of course, entail heavy economic loss if the theater owner preferred to close down the theater rather than go on with the contract. The fact that the plaintiff herself was not a person of extraordinary qualifications is utterly immaterial when she asks for relief, unless the artificial rule of lack of mutuality of remedy is to be narrowly applied. Lacy v. Heuck (1883) 9 Ohio Dec. Reprint, 347 was a theater case very similar in facts to Welty v. Jacobs; the plaintiff asked both negative and affirmative relief; refusing to give the latter on the ground of supervision the court gave the injunction sought for, saying: "The case at bar differs from all the cases cited in that the position of the parties is here reversed. In those cases it was manager against actor, in this it is actor against manager, but in both the personal services of the other party are sought and in that respect they are the same in principle. If Heuck could enjoin Lacy from performing the next week in any other place than his opera house, why should not Lacy have similar relief to secure the services of Heuck and his subordinates in the management of the opera house?"

In Foster v. Ballenberg (1890) 43 Fed. 821 the court in refusing an injunction suggests as one of the grounds the facts that the new opera troupe had no knowledge or notice of the plaintiff's contract with the defendant; can it be fairly argued that the doctrine of *bona fide* purchaser for value be applied to such a case? See *post* § 301.

4. See *post* §§ 174-180.

The doctrine of lack of mutuality of performance is, however, well settled and sound on principle. That doctrine is that equity will not give specific performance unless it can adequately protect the defendant against possible later non-performance by the plaintiff.[5] For example, the case already discussed[6] of refusing the borrower specific performance of a contract to lend money where the circumstances were such that damages were inadequate, is to be properly rested upon the ground that the lender could not be protected against the borrower's possible later non-performance in failing to repay the money. Does the decision in Lumley v. Wagner square with this doctrine? Suppose that after getting the injunction Lumley should refuse to let the defendant sing or refuse to pay her for singing according to the contract? The defendant is at least partially protected against the possibility by a decree conditional upon the plaintiff's performing his part of the contract, so that if the plantiff should later default in his performance, the defendant could have the injunction dissolved.[7]

But suppose that the defendant after having been enjoined, chooses to do nothing rather than perform her contract with the plaintiff; in such a case the plaintiff will apparently be under no obligation to pay anything. The compensation was not apportioned by the parties and it is doubtful whether the court should make an apportionment; such action on the part of the court would seem too much like making over the contract, and

5. See *post* § 181.

6. See *ante* § 63.

7. Of course it might happen that she could not at this later time get employment. In deciding whether to issue the injunction the court should take into consideration this possibility. In the actual case of Lumley v. Wagner Miss Wagner's reputation was such that she probably would have had no difficulty in securing employment at any time during the regular season. If at the time of asking for the injunction the plaintiff himself has already defaulted, *a fortiori* equitable relief will be refused. Measures Brothers v. Measures (1910) 2 Ch. 248.

while courts of equity have in some classes of cases done this,[8] the practice is not to be commended. The result is that altho part of the compensation was meant to be in return for the defendant's not singing elsewhere, she could probably get no compensation for the bare compliance with the injunction. Can it be truly said then that equity properly protects the defendant in such a case? This is the only criticism of the decision in Lumley v. Wagner which has much merit and can be answered only by saying that where the hardship on the plaintiff is great the court is justified in taking chances that the enforcement of the negative will result in the performance of the affirmative also; that if the defendant should be obstinate enough to refuse to perform the affirmative promise, she is hardly in a position to complain of lack of protection.

§ 79. Same—employment of substitute by the plaintiff.

Suppose the plaintiff either before or after obtaining the injunction had employed some one else permanently in place of the defendant so that he was unable to go on with the contract when the defendant tendered her services. It seems clear that in such a case the plaintiff should be entitled to have the injunction continued only if he is willing to pay the entire compensation. This would be true even if the consideration had been apportioned because the plaintiff is entitled to the injunction only on the assumption that he wants and is ready to receive full performance. This would be adequate protection to the defendant where, as in Lumley v. Wagner, she wished only money. If the opportunity of appearing before a London audience had been important to her, this element of hardship on the defendant should be balanced by the court against the hardship on the plaintiff if the injunction were refused or dissolved.

8. See *post* §§ 121-123.

In Montague v. Flockton[1] where the plaintiff had employed another to take the defendant's place, the court gave the injunction without requiring the plaintiff to pay the defendant any compensation whatever, saying that the defendant had brought this trouble upon himself. The result of that decision was that unless the defendant should go to another city where he would not injure the plaintiff's business, he must remain idle for the whole period and receive no pay. This would seem to be carrying the doctrine of Lumley v. Wagner too far; it is difficult to imagine a case of such great hardship on the plaintiff as to counterbalance such a hardship on the defendant. If it were important for the defendant to appear before an audience in that particular city, the hardship upon him would of course be all the greater. On this point it is believed that Montague v. Flockton will not and should not be followed.

§ 80. (7) An express negative promise.

In Lumley v. Wagner there was an express negative promise, but it is well settled,[1] except in Illinois,[2] that it is not necessary that the negative be express; it is sufficient that it was actually intended by the parties; whether it was so intended is a question to be determined upon all the circumstances of the particular case. In Montague v. Flockton[3] the court said: "an engagement to perform for nine months at Theater A is a contract not to perform at Theater B, or any other theater whatsoever." The court was probably right in implying a negative in that case but it would be unfortunate to lay down a hard and fast rule of construction. It is conceivable that circumstances might be

1. (1873) L. R. 16 Eq. 189, 1 Ames Eq. Cas. 105.

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1. Duff v. Russell (1891) 60 N. Y. Super. Ct. 80, 83.

2. See Southern Fire Brick & Clay Co. v. Garden City Sand Co. (1906) 223 Ill. 616, 79 N. E. 313 and a criticism thereof by Professor Schofield in 2 Ill. Law Review 217-243.

3. (1873) L. R. 16 Eq. 189, 1 Ames Eq. Cas. 105.

such that the parties would intend the employee to be free to act at other theaters at such times as he would not be actually employed at Theater A. For example, in Webster v. Dillon[4] the injunction was expressly limited in duration to the ordinary hours for performance at the plaintiff's theater.[5] On the other hand, in Hoyt v. Fuller[6] where the defendant had represented herself to be the only person who could perform a certain kind of dance, she was enjoined from using her leisure time in performing the same dance at other theaters.

However, the mere fact that there is an express negative promise does not insure the granting of equitable relief. In Sternburg v. O'Brien[7] the defendant had agreed to work for the plaintiff as collector in the installment clothing business, and not to work in that business for a year after ceasing to work for the plaintiff. After working for the plaintiff for four or five weeks he quit and shortly afterward accepted employment as collector for a person carrying on a rival business. An injunction was refused on the ground that damages were adequate. There was nothing to show that the defendant was a collector of unique or extraordinary ability, he was not engaged in a fiduciary capacity, and had worked for the plaintiff for such a short time that he could not have acquired much influence over the plaintiff's customers, especially since he was not a salesman but a mere collector.

Every affirmative promise necessarily implies a promise not to do anything inconsistent with the per-

4. (1857) 3 Jur. [N. S.] 432.

5. It might not damage the plaintiff's business for the defendant to perform for him in the evenings and for other theaters in the afternoon, because the performances at different times might attract different classes of patronage; whereas it might be a serious damage to his business for the defendant to act elsewhere in the vicinity in the evenings.

6. (1892) 19 N. Y. Supp. 962.

7. (1891) 48 N. J. Eq. 370, 22 Atl. 348, 1 Ames Eq. Cas. 126.

formance of the affirmative promise;[8] hence, the mere fact that the defendant has broken an implied negative promise does not entitle the plaintiff to an injunction. For example, a promise to sell chattels to the plaintiff necessarily implies a promise not to sell to another, but equity will not give an injunction unless damages at law are for some reason inadequate. In Fothergill v. Rowland[9] the defendant had agreed to sell the whole of the get of the coal of the No. 3 seam of the Newbridge colliery at a fixed price for five years. The plaintiff asked for an injunction against the defendant's selling any coal from that seam to any other person during the continuance of the contract with the plaintiff, the contract having three years yet to run. The injunction was denied, there being nothing to show that damages were not an adequate remedy. If the plaintiff had shown that coal fluctuated greatly in value or that this coal was of a special character not to be obtained elsewhere, the case would probably have gone the other way because under such a state of facts the affirmative itself could have been specifically enforced; there would have been no difficulty as to supervision because the defendant's contract was not to work the mine but merely to sell what he actually did produce.

Putting a promise which is affirmative in substance in a negative form will not strengthen the plaintiff's case. In Davis v. Foreman[10] there was a contract of employment with a covenant not to discharge. The plaintiff sought the enforcement of the negative; the injunction was refused on the ground that the negative

8. American Association Base Ball Club v. Pickett (1890) 8 Pa. C. C. R. 232: "Every express promise to do an act embraces within its scope an implied promise not to do anything which will prevent the promisor from doing the act he has engaged to do."

9. (1873) L. R. 17 Eq. 132, 1 Ames Eq. Cas. 111.

10. (1894) 3 Ch. 654. In Kirchner & Co. v. Gruban (1909) 1 Ch. 413 the employee agreed "to remain in his position and not to give notice before July 1, 1901". Relief was refused on the ground that to give an injunction would in effect give specific performance of the affirmative promise to work for the plaintiff.

here was simply another way of stating the affirmative; since the affirmative would not be enforced, the negative would not be.[11]

§ 81. (8) The defendant's services were unique.

In Lumley v. Wagner the defendant was a person of extraordinary qualifications,[1] so that it was impossible for the plaintiff to have filled her place even substantially. If the consideration had been apportioned by the parties so that the defendant would have received some pay for obeying the injunction without performing the affirmative promise, the mere fact that damages for breach of the negative promise would be conjectural would be enough to justify a court of equity in granting relief, just as in case of a contract entirely negative.[2] But where, as in Lumley v. Wagner, the

11. Even where there was no express negative promise, plaintiffs have frequently asked for decrees which, tho negative in form, were really affirmative in substance. For example, see Harlow v. Oregonian Pub. Co. (1904) 45 Or. 520, 78 Pac. 737 where the plaintiffs asked that the defendants be "restrained from refusing to furnish them papers etc."; Ryan v. Mutual Tontine etc. Association (1893) 1 Ch. 116, in which the plaintiff asked an injunction to restrain the defendant from employing as a porter any person who was not resident and constantly in attendance and able and willing to act as the servant of the plaintiff. See 7 Harv. Law Rev. 53. This confusion of form and substance probably originated in Lane v. Newdigate (1804) 10 Ves. 192, 1 Ames Eq. Cas. 74, where the court quite unnecessarily put an affirmative decree in negative form.

1. While it may be urged that it is literally impossible to have different degrees of uniqueness, yet as a practical matter it is a matter of degree, like adequacy, and in determining it, much must be left to the discretion of the trial court; it is not the sort of thing that can be reduced to a rigid rule.

2. See *ante* § 74. In Daly v. Smith, *supra*, the defendant was to receive one-fourth salary for refraining from acting for others if she should abandon her contract with the plaintiff; she would still probably be entitled to this one-fourth if she should go for employment far enough away so as not to injure the plaintiff. Hence, the analogy between Daly v. Smith and contracts not to compete is fairly close. It is therefore important for the employer in drawing up a contract to

defendant in order to earn anything, must either perform the affirmative undertaking, or else go far enough away not to injure the plaintiff, this hardship[3] on the defendant is so great that courts of equity should not and usually do not interfere unless the services contracted for are unique and extraordinary,[4] so that there would be a corresponding hardship on the plaintiff if specific performance were refused.[5]

provide for separate compensation for the performance of the negative if he wishes later to get an injunction, because it will save him the trouble of proving that the employee was unique; it will be enough for him to show that damages for breach of the negative would be conjectural.

3. While the injunction is limited to the sort of services contracted for by the plaintiff, the chance that the defendant will be able to secure employment in other lines of activity, for example, as a dancer rather than a singer, is usually slight. In Ehrman v. Bartholomew (1898) 1 Ch. Div. 671, the defendant, a traveling salesman, had contracted to work for the plaintiffs, wine merchants, for ten years and not to "engage or employ himself in any other business" with persons other than the plaintiffs during the continuance of the agreement. After six months the defendant left the plaintiff's employ and engaged himself to a rival. The court refused the injunction because the promise was to abstain wholly from business, and not merely from the wine business. Perhaps the long term of the contract may have had some influence in keeping the court from construing "business" to mean "wine business".

4. Sternburg v. O'Brien (1891) 48 N. J. Eq. 370, 1 Ames Eq. Cas. 126 (collector in installment clothing business); Columbia College of Music v. Tunberg (1911) 64 Wash. 19, 116 Pac. 280 (music school teacher); Burney v. Ryle & Co. (1893) 91 Ga. 701, 17 S. E. 968 (insurance agent); Lasky Feature Play Co. v. Surratt & Fox Film Corp. (1915) 154 N. Y. Supp. 974 (moving picture actress); Kimberley v. Jennings (1836) 6 Sim. 340 (travelling salesman). The last mentioned case was decided before Lumley v. Wagner. In Butler v. Galetti (1861) 21 How. Prac. 465 it was held that Lumley v. Wagner did not apply to dancing because it did not involve the exercise of intellectual qualities; this does not, of course, represent the present judicial attitude.

5. An express stipulation in the contract that the employee has extraordinary qualifications so that in case of breach the employer should be entitled to enjoin the employee's working for any other person is properly held to be ineffectual. Dockstader v. Reed (1907) 121 N. Y. App. Div. 846, 106 N. Y. Supp. 795. On the other hand, a stipulation that in case of any breach by the employee he should forfeit $200 was held sufficient to prevent the employer from getting an in-

D. RELIEF FOR AND AGAINST THIRD PERSONS.—EQUITABLE SERVITUDES.

§ 82. Assignability of contracts at law and in equity.

In the early common law, contracts, even tho for the mere payment of money, were not assignable; if X owed A a debt of $100, he could insist upon paying no one but A.[1] The pressure of growing commercial interests gradually compelled this to be changed as to contracts to pay money. Some early equity cases seem to show that equity courts took the lead[2] in the matter, but the common law courts worked out a method of assignment by regarding the assignee as the agent of the assignor and allowing him to sue in the name and as the representative of the assignor.[3] Whether the exercise of the jurisdiction of the equity courts can fairly be said ever to have become firmly established or not, it was apparently discontinued[4] after common law courts afforded a remedy. At the present time, in nearly every jurisdiction there are statutes not only allowing but requiring the assignee to sue in his own name as the real party in interest.

junction because he could not show that his damage would be irreparable. Hahn v. Concordia Society (1875) 42 Md. 460. But this seems at least questionable. See *ante* § 40. In 6 Columbia Law Review 82, 91 the argument is made that all persons should be considered unique, just as are all pieces of land. For a summary of the preceding sections see 17 Col. Law Rev. 701.

1. See 3 Harv. Law Rev. 337; 18 *id.* 23, 24.

2. At some time in the 17th century equity began giving relief to the assignee when the assignee had paid value for the assignment, the assignee suing in his own name. In Squib v. Wyn (1713) 1 P. Wms. 378, the court states that "choses in action are assignable in equity but not at law" as if it were then well settled.

3. See *post* § 261.

4. Hammond v. Messenger (1838) 9 Simon 327, Ames Trust Cas. 59. If the assignor threatens to collect, the assignee may get an injunction upon *quia timet* grounds. See *post* § 261. In spite of such

In equity, contracts which are not personal in their nature have always, apparently, been considered assignable and since equity looks at the substance and not at the form, the assignee has always been allowed to sue in an equity court in his own name. Hence, if V makes such a contract with P that P could get specific performance, e. g., a contract for the sale and purchase of land, an assignee of P has a similar right.[5]

§ 83. The creation of a property right in the purchaser.

The purchaser's specifically enforcible right[1] to get specific property is of necessity a specific property right and not a mere contract right.[2] One might reasonably expect that equity would consider that this property

discontinuance, however, such assignments are still frequently referred to as "equitable assignments."

5. And it is not necessary to make the assignor a party. Currier v. Howard (1860) 14 Gray 511. See 17 Harv. Law Rev. 175.

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1. Juridical rights are all deductions from juridical remedies; hence, as soon as it became settled that a purchaser could get the *remedy* of specific performance of a contract to convey land, the inference or deduction was that there was already a specifically enforcible *right* to the property which was the basis for his suit. Before a remedy is once given in any particular class of cases there may be an *interest* which should be protected, but no *right* can be said to arise until such protection is given. After the remedy is once given we infer the existence of a right before the suit was brought; and if the decision is acquiesced in as representing the probable future action of the courts in such cases, the right in similar cases is then thought of as existing before any remedy is sought to enforce it and even tho no remedy is ever sought. Where a right is given by statute the inference above indicated is unnecessary.

2. The vendor's right to specific performance is not a right to specific property but merely a contract right to money. He has, of course, legal title to the property till conveyance and is entitled to hold it as security till the purchase price is paid or secured, but his having the legal title is not due to the contract. In case of contracts to exchange lands, each has an equitable specific property right in the land of the other. If X contracts with Y to trade his farm for Y's ordinary chattels, does X have an equitable specific property right in the chattels? There seem to be no cases.

right came into existence at the time set by the parties for performance, because it is not till then that the purchaser can properly ask for a conveyance.[3] But the rule seems to be well settled that equity regards the purchaser as having a specific property right from the moment of making the specifically enforcible contract. There are two reasons for the rule. (1) If no time is set for performance a purchaser is entitled to ask for performance after a reasonable time has elapsed. It would be highly inconvenient to have the time of coming into existence of important property rights open to such an uncertainty. In the field of property law generally it is of great importance that the rules be certain. Since it is fairly easy to determine the date of the completion of a contract, the advantage of having the equitable property right date from this time is obvious. (2) If a time is set for performance and the vendor keeps the property till that time, it might not be objectionable to regard the

3. This view was strongly urged by Professor Langdell in discussing the equity rule as to risk of loss:

"What is the rule in equity in such a case? Clearly it ought to be the same as at law, if the loss happen before the time fixed for completing the purchase has arrived; for in that case the consequences of the loss will be the same in equity as at law, namely, that the vendor will be unable to perform the contract on his part. It is true that equity may enforce the contract against the vendee, notwithstanding the destruction of the buildings; but if it does, it must do so because the breach of condition by the vendor did not go to the essence of the contract, and hence the performance by the vendee must be with compensation for the loss of the buildings, i. e., the value of the buildings must be deducted from the purchase-money to be paid by the vendee. If, on the other hand, the fire happen after the time fixed for completing the purchase is past, the loss will in equity fall upon the vendee: i. e., the vendor will be able to throw the loss upon the vendee by enforcing specific performance of the contract in equity, assuming, of course, that he is in a condition to enforce such performance. The reason of this is that, when performance of a contract is enforced in equity, the performance is held to relate back to the time fixed by the contract for its performance; and hence, if performance be enforced in the case supposed, equity will regard the land as having belonged to the vendee when the loss happened."

purchaser as having only a common law contract right before that time, and to regard the equitable property right as coming into existence at that time if the vendor failed to convey. But to hold that the purchaser has only a common law contract right till the time for performance would make it possible for the vendor to prevent the purchaser from ever getting any property right by merely conveying away the property before the time came.[4] In order, therefore, to give the purchaser adequate protection the equity courts were forced—consciously or unconsciously—to regard the purchaser as having a property right from the moment of contract.[5]

The situation between the vendor and purchaser may then be briefly stated as follows: from the moment a contract is entered into which equity would enforce on behalf of both parties, the vendor is treated in equity as a fiduciary[6] of the land, holding the legal title

4. At the time when the rules as to specific performance were taking shape, the common law of contracts—not yet having worked out implied conditions—gave even less protection to a purchaser than at present; apparently he could be compelled to pay the full price without getting the land. There was therefore a still further reason at that time for holding that the equitable property right arose at once. It is common to refer the doctrine to the equitable maxim that equity regards that as done which ought to be done or was agreed to be done; but if that were applied literally it would result in considering the equitable property right as coming into existence at the time set for performing—not at the time of making the contract.

5. See 31 Harv. Law Rev. 285 note.

6. It is quite common to say that the vendor is a trustee. This was quite natural because the rules in trusts had been worked out before those in specific performance, and the situation was analogous in some respects. But the analogy was not perfect, and the more general term "fiduciary" is therefore used. Where a vendor has been fully paid the purchase price, he ceases to have any beneficial interest in the land and is substantially in the position of a trustee. If he has not been fully paid, it is inaccurate to refer to him as a trustee because he has an interest in the land which he may properly transfer by conveying to anyone but a *bona fide* purchaser for value without notice, while the trustee is under an obligation not to transfer the property to anyone, even though he may have loaned money to the

as security for the payment of the purchase money; while the purchaser is treated as the equitable owner with the right to become the legal owner upon paying or satisfactorily securing the price. But the equitable property right, tho it come into existence at the moment of the contract is postponed as to enjoyment till the time for performance. In this latter respect the relation of vendor and purchaser is not merely that of fiduciary and beneficiary but is also analogous to the relation between the tenant of a particular estate and the holder of a shifting use or executory devise.[7]

It is often said that the purchaser is trustee of the purchase money;[8] this is inacurate. If, as is usually the case, he does not have the sum set aside there could be no trust because there would be no trust property.[9] And even tho he does have the amount of money on hand and sets it aside, no trust thereof will arise till the vendor assents[10] to the creation of a trust in the money.[11]

§ 84. Express trusts—constructive trusts.

As pointed out *ante*,[1] the primary right in ex-

cestui que trust upon the security of the trust property. And it is not accurate to call him a constructive trustee, because his obligation to hold the property for the purchaser and then convey to him is consensual, not constructive. Because of his obligation not to convey to a *bona fide* purchaser, he may properly be called a fiduciary.

7. For example, a devise to X in fee, but if Y pays X $1000 then over to Y in fee; Y has a property right which will be protected even before the contingency happens.

8. Pooley v. Budd (1851) 14 Beav. 42.

9. See *post* § 258.

10. See *post* §§ 255, 258.

11. It is possible that courts calling the purchaser a trustee of the purchase money may have in mind merely that equity will compel him to pay the full amount and take the land, whereas the common law remedy is merely for the loss caused by the breach.

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1. See *ante* § 34.

press trusts[2] is equitable. When the legal title of property other than money was placed in one person to hold for the benefit of another, the latter was afforded no remedy at common law; he had to rely upon the honesty of the holder of the legal title; the obligation was only moral. Equity, being a court of conscience, gave the beneficiary a remedy and thus turned the merely moral obligation into an enforcible one. If the holder of the legal title had other duties to perform, he was called a trustee; if his duty was to remain passive, he was called—if the property were land—a feofee to uses. Some years after equity began giving a remedy against the feoffee to uses Parliament passed the Statute of Uses,[3] giving the beneficiary of the use or *cestui que use* the legal title, thus destroying uses. The statute did not apply to trusts. About a century later the modern passive trust arose, similar to the ancient use but held by the equity courts not to be affected by the Statute of Uses. Hence, at the present time a trust may be either an active or a passive one.

At first equity gave its remedy only against the trustee or feoffee to uses; his transferee whether by descent, devise, or conveyance *inter vivos* was not held bound unless he too expressly undertook the trust. This obviously was not a complete protection to the beneficiary[4] so the equity court took the further step that the transferee would be presumed to have taken the property upon the original use or trust; this presump-

2. This section and the following comprise a very brief statement, inserted here to throw light upon the subjects discussed in the sections following. For a more extended discussion see *post* Chap. V.

3. (1535) St. 27 Hen. VIII, c. 10.

4. Because the trustee could easily defeat him by merely conveying the property to some one who did not expressly undertake the trust. When equity courts first gave a remedy to the *cestui que trust* against his trustee they created in the *cestui que trust* an equitable property right. Even though it was enforcible against only one person, it can hardly be regarded otherwise than as a property right. But a property right which is enforcible against only one person is of

tion may have been at first a genuine presumption, i. e. what is usually called a presumption of fact, capable of being rebutted by showing that the transferee did not so take the property, but if it ever was thus rebuttable, it soon hardened into a hard and fast rule; the transferee, subject to an exception to be discussed presently, was held bound as if he had undertaken the trust, whether he had actually done so or not. The obligation thus being imposed or constructed by equity in order to protect the beneficiary more fully, it is commonly called a constructive trust. The primary right[5] in cases of constructive trust is very frequently legal; i. e. the person whom equity would hold as constructive trustee of property is very frequently liable, at the option of the injured party—to a common law action in quasi contract for the value of the property, based upon the unjust enrichment which would result if no remedy at all were given.[6]

§ 85. Limitation of constructive trust doctrine—bona fide purchase for value without notice.[1]

But equity does not hold all transferees from a trustee liable to the beneficiary. If the trustee transfers to one who pays value for the property and acquires title before notice of the rights of the beneficiary of the trust, such a transferee is protected as against the beneficiary; he is usually called a *bona fide* purchaser for value without notice. For the sake of

relatively little value because it can be so easily destroyed; therefore the courts were forced, in order to give adequate protection to the *cestui que trust*, to give a remedy against all transferees except *bona fide* purchasers for value without notice.

5. The doctrine of constructive trust was extended to all cases where the plaintiff sought to get specific property which the defendant had wrongfully obtained or wrongfully retained.

6. Sometimes he may be held liable in a common law tort action; e. g., if he obtained a conveyance of the land by fraud.

1. For a more extended discussion see *post* § 301.

brevity he will be called a *bona fide* purchaser. As already pointed out,[2] the maxim that between equal equities the legal right prevails is always cited as being the basis for the doctrine of *bona fide* purchase for value without notice. Where there are two equitable claimants whose claims have substantially equal merit, the fact that one has the legal title is enough to turn the scale against giving relief to the other claimant; having the legal title, the defendant may retain it unless the plaintiff shows a substantially better right in himself.[3]

In order for one to become a *bona fide* purchaser in the full sense three conditions must be complied with: he must pay all, or at least a substantial part, of the purchase money; he must get title and he must have done both of these before receiving notice of the rights of the beneficiary.

Both the doctrine of constructive trust and its limiting doctrine of *bona fide* purchaser apply not merely to wrongful transfers by trustees, but throughout the whole field of equity. Wherever one party has acquired title to property which it is unjust for him to retain, equity will, as a remedy to the injured party, declare a constructive trust of the property for his benefit. And a *bona fide* purchaser of property is protected not only against the equitable claim of a *cestui que trust* but against all sorts of equitable claims to the property.

It is to be noted carefully that it is not necessary that the defendant acquire the property wrongfully; it is sufficient that it is unjust for him to retain it. For example, if a trustee or vendor or any other person holding property subject to an equity should make a gift of the trust property to his son who should receive it without notice of the trust, the son has com-

2. See *ante* § 27.

3. See 1 Harv. Law Rev. 1, Purchase for Value Without Notice, by Professor Ames.

mitted no wrong in thus receiving it; but from the moment that he receives notice of the equitable claim it is unjust for him to retain it; the constructive obligation to hold it for the benefit of the defrauded party arises, therefore, at that moment.[4]

§ 86. Transfer of land by vendor or lessor.

If after making a specifically enforcible contract to sell an interest in land the owner should thansfer the land to a third person or should die and the land should descend to his heir or should go by will to a devisee the doctrine of constructive trust would apply; unless the transferee is a *bona fide* purchaser he takes subject to the equitable right of the purchaser under the contract. In Jackson's Case,[1] X had contracted to make a lease of certain land to the plaintiff; he then conveyed the land to the defendant who had notice of the plaintiff's contract. It was held that the defendant was bound by the contract; that he stood in no better position than X[2] and therefore the plaintiff was entitled to specific performance of the contract. It is to be noted here that X was a fiduciary only to the extent of the contracted leasehold interest and therefore the defendant was a constructive trustee only to the same extent.

§ 87. Assignability of specifically enforcible option.

As pointed out already,[1] where a specifically enforcible contract is made to convey an interest in prop-

4. See *post* § 301.

1. (1609) Lane 60, 1 Ames Eq. Cas. 143.

2. If the plaintiff has not yet paid the price and the transferee is not entitled—as between himself and vendor—to all the purchase money, the proper procedure is to have the vendor made a party and settle the rights to the purchase money in the same litigation. See Daniels v. Davison (1811) 17 Vesey 433.

1. See *ante* § 83.

erty, the purchaser under such a contract has both a common law contract right and an equitable property right. Similarly, if the purchaser had first taken a specifically enforcible option to buy which he later exercises, by acceptance, from the moment of such exercise he is in exactly the same position as if he had made a contract of purchase in the first place. But after the procuring of the specifically enforcible option and before its exercise, does he have a mere contract right or a property right? This point will be discussed later;[2] at present it is enough to show that his right, whatever it is, is assignable. In House v. Jackson[3] the defendant leased certain land to one Haley, the lease giving to Haley an option to buy the land at any time before the expiration of the lease for $2500. Haley went into possession and later assigned all his interest under the lease to one Pomeroy who assigned it to one Righetto and the plaintiff; Righetto then assigned his interest to the plaintiff who before the lease expired tendered the defendant $2500 and demanded a deed. Specific performance was decreed.

§ 88. Bankruptcy of vendor; of purchaser.

If after the making of a specifically enforcible contract the vendor becomes bankrupt, the assignee in bankruptcy, not being a *bona fide* purchaser, takes the property subject to the right of the purchaser to enforce specific performance. The purchaser, having an equitable property right and not merely a contract right, is entitled to that property in specie and need not come in with the general creditors.[1] Likewise, specific performance may be enforced by the vendor's assignees in bankruptcy against the purchaser.

On the other hand, if it is the purchaser who be-

2. See *post* § 111.

3. (1893) 24 Oreg. 89, 32 Pac. 1027, 1 Ames Eq. Cas. 137.

1. *Re* Kerkham (1886) 80 Law Times 322.

comes bankrupt instead of the vendor, the vendor can not enforce specific performance against the assignees in bankruptcy of the purchaser.[2] The reason for this is that his right is not a right to any specific property of the purchaser but merely to a sum of money out of the purchaser's general assets; hence, there is no specific property which he can claim; and altho his remedy at law may not be adequate, it would inflict too great a hardship on the other creditors to throw upon the assignees in bankruptcy the burden of getting rid of the property which would be thus thrust upon them. The vendor's remedy is to sue for breach of contract, reduce his claim to judgment and then prove with the other creditors.

While, however, the purchaser's assignees in bankruptcy can not be compelled to take the property and pay the purchase price, they may, if they prefer, enforce specific performance against the vendor.[3] For example, if the property has advanced greatly in value since the making of the contract, it might be advantageous for the assignees to get specific performance and then resell the property at a profit. This is one of the well established exceptions to the supposed rule[4] that lack of mutuality of remedy is a defence. It is however no exception to the principle of lack of mutuality of performance, because the specific performance will not be decreed against the vendor unless the assignees in bankruptcy pay the full purchase price[5] for the property.

2. Pearce v Bastable (1901) 2 Ch. 122, 125.

3. In Crosbie v. Tooke (1833) 1 Mylne & Keen 431, 1 Ames Eq. Cas. 135, the purchaser (of a leasehold interest) assigned it to X who sued for specific performance. It was held that the purchaser's insolvency was no defense to X's suit against the vendor for specific performance.

4. See *post* § 174.

5. If one who has contracted for a lease becomes insolvent, but not bankrupt, may he get specific performance without tendering the full amount of the rent for the entire term? In Buckland v. Hall (1803) 8 Ves. 92, Lord Eldon said he considered it a "weighty ob-

Even where the purchaser has not become bankrupt the fact that part or all of the purchase money has not, by the terms of the contract become due will not excuse the purchaser from paying it in full if he wishes specific performance. An assignee of the purchaser stands, of course, in no better situation.[6]

§ 89. Contract to devise or bequeath property.

A contract to devise realty or to bequeath personalty is treated similarly to a contract where the parties contemplate a conveyance by deed. If the contract is specifically enforcible the owner of the property is treated from the moment of making the contract as a fiduciary thereof; hence, if he devises or bequeaths to another[1] or allows it to descend to his heir[2] or to be distributed to the next of kin,[3] or transfers it by deed to some one[4] other than a *bona fide* purchaser, specific performance will be decreed and a constructive trust declared for the benefit of the person entitled under the contract. If the latter fears that the promisor may,

jection" to giving specific performance. See also Price v. Asheton (1835) Y. & C. 441, 444. If he has become bankrupt it would seem that the rule as to purchasing the fee should apply and the assignees should be compelled to tender the whole amount. See Brooke v. Howitt (1796) 3 Ves. 168, 169. A somewhat similar rule prevails in the sale of chattels. Tho one who has contracted to buy a chattel has stipulated for credit as to part or all of the purchase money, his bankruptcy puts an end to his right to credit and the seller is not put in default unless the full amount is tendered. See Williston, Sales § 662, p. 1111.

6. Wass v. Mugridge (1880) 128 Mass. 394, 1 Ames Eq. Cas. 138. Perhaps it would be enough if the assignee, being himself solvent, were willing to pay a substantial part and secure the rest.

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1. Young v. Young (1889) 45, N. J. Eq. 27, 16 Atl. 921.

2. Sutton v. Hayden (1876) 62 Mo. 101. Conversely, if Z contracts not to make a will, and in violation thereof, devises to X, the heirs may enforce against the devisee; Taylor v. Mitchell (1878) 87 Pa. 818.

3. Whiton v. Whiton (1899) 179 Ill. 32, 54, 53 N. E. 722.

4. McGuire v. McGuire (1874) 74 Ky. 142.

in violation of the contract, convey the property to a *bona fide* purchaser,[5] he should file a bill for specific performance at once, without waiting for the promisor's death. The decree in such a case will not be that the defendant make the will because even if he did make the will he could revoke it at any time; an equity court will not render such a futile decree. The decree will usually be that defendant shall upon his death, convey to the plaintiff.[6] Such a decree would, on the doctrine of *lis pendens,* prevent any one from becoming a *bona fide* purchaser, and would enable the plaintiff without instituting another suit, to procure the property from the heir or transferee if the defendant died without fulfilling the order of the court.

Where the contract was to bequeath nothing but ordinary chattels or money equity formerly gave relief because of its jurisdiction over the administration of estates.[7] There seems to be some doubt whether this jurisdiction still exists.[8]

§ 90. Right of a beneficiary of a contract to sue in equity.

A transaction between two persons may be entered into for the purpose of benefitting a third person, whom we will call in this section a beneficiary. There are four types of these beneficiaries, classified according to the kind of transaction involved: viz., beneficiaries

5. Or if there has already been a conveyance to a third party who is not a *bona fide* purchaser for value and the plaintiff fears that delay in asking for relief may prejudice his rights. See Van Dyne v. Vreeland (1857) 11 N. J. Eq. 370, 12 N. J. Eq. 143.

6. Davison v. Davison (1861) 13 N. J. Eq. 246, 253.

7. Maitland's Equity and the Forms of Action 193, 28 Harv. Law Rev. 242.

8. Whiton v. Whiton supra seems to assume that it still exists; but see 19 Harv. Law Rev. 473. In Turnipseed v. Sirrine (1900) 57 S. C. 559, 35 S. E. 757, specific performance was given of a contract to make mutual wills, the promisor having only personal property at his death; but it was apparently on the ground of the difficulty of estimating damages.

of bailments, trusts, charges on property, and of contracts. Very early,—apparently while the common law was still somewhat elastic,—detinue, which was the normal remedy for the bailor where the bailee was under a duty to redeliver to him, was given to the beneficiary of the bailment;[1] so that if A bailed a bag of gold to B to be handed over to X, X had a common law remedy as adequate as if he had been a party to the transaction.

In the case of trusts, unless the duty of the trustee were the very simple one of paying over money, the matter was too complicated to be handled by the common law machinery and the *cestui que trust* had to be protected by equity, whether he was merely the beneficiary or was also the creator of the trust.[2]

If A owning property (usually land) conveyed it to X reserving a charge thereon to himself, or if he kept the land and conveyed a charge to X, the holder of the charge could enforce it at common law.[3] If, however, a charge was attempted to be created in favor of a third person, B, the common law failed to give relief and equity had to interfere[4] to protect the beneficiary. Since his sole relief is in equity the charge is called an equitable charge.

In the fourth case of the beneficiary[5] of a contract, the early lommon law gave him no relief. Logically we should expect that equity would interfere in his behalf just as it had in the cases of the trust and

1. Madgeburg v. Uihlein (1881) 53 Wis. 165; see *post* § 251.

2. See *post* § 274.

3. See *post* § 260.

4. See Jaquet v. Jaquet (1859) 27 Beav. 56, Ames Trust Cas. 56. See *post* § 260.

5. Where the performance of the contract would result in a gift from the promisor to the beneficiary, the latter is called a sole or gift beneficiary. The term "gift beneficiary" is preferable because the performance might be partly for the benefit of the promisee and partly for the benefit of the third person, in which case the beneficiary would not be the sole person interested in the performance. If the performance of the contract would result in the payment of a debt

the equitable charge, on the ground of no relief at law, by giving specific performance of the promise. However nothing of the sort occurred,[6] perhaps because, by the time the question was squarely presented, equity had lost much of its former elacticity. Within the last century, however, the majority of courts in this country have given the beneficiary the common law remedy of special assumpsit,[7] so that in this respect the common law has shown itself less rigid than equity. Where the contract is of a specifically enforcible character the beneficiary has usually been allowed to have specific performance,[8] often without argument; this is true even in England,[9] where the beneficiary has no relief at law apart from statute. In Cassey v. Fitton,[10] Cassey had two sons, John and William, by different wives; John being sickly and childless, C was unwilling to let the estate descend to him, because it would not descend from him to his half brother William, and was therefore about to make a settlement in order to limit a remainder to William. John thereupon promised his father that if he would let the land descend, he would alien no part of it more than was necessary to pay his debts and would leave all the rest to his younger brother. C assented to this and died without making a settlement. John devised the property to the defendant; the property having been sold, presumably to a *bona fide* purchaser, the court declared a

due from the promisee to the third person the latter may conveniently be designated as a payment beneficiary. Nearly all cases of beneficiaries of contracts belong to one or the other of these two types. See *post* § 258.

6. Except that in England the law of trusts was illogically extended to protect gift beneficiaries. Moore v. Darton (1851) 4 De Gex & Smale 517, Ames Trust Cas. 39. See *post* § 259.

7. Or its equivalent under the codes; see 15 Harv. Law Rev. 767-809.

8. See Weis v. Meyer (1886) 1 S. W. 679 (Ark).

9. See Gandy v. Gandy (1885) 30 Ch. Div. 57, 66.

10. (1679) 2 Hargrave, Judicial Arguments 296, 1 Ames Eq. Cas. 145.

constructive trust of the proceeds of the land for William, the gift beneficiary of the contract.

§ 91. Specific performance given to protect purchaser's right to security.

Even tho the purchaser under a contract has conveyed his interest to another, he may get specific performance against the vendor or the vendor's assignee if the legal title is necessary to protect him fully as security for the purchase money still unpaid by his transferee. In Bird v. Hall[1] one Hall had contracted to sell some land to one Bird, who paid part; Bird then contracted to sell his interest to McFee, who paid part and was placed in possession; Hall then transferred to McFee the legal title. Bird now asks that McFee be decreed to convey the legal title to Bird so that Bird will have security for the balance due; the court decreed the conveyance. Even tho Bird might have held Hall responsible for the damage which was caused by thus depriving him of the security, the remedy would not be adequate; as the court pointed out, the measure of recovery against Hall would be conjectural,[2] because until the rest of the purchase money is due, it would be impossible to tell how much the plaintiff would be damaged by the loss of the security.

§ 92. Specific performance against assignee of purchaser.

As already pointed out,[1] the assignee in bankruptcy

1. (1874) 30 Mich. 374, 1 Ames Eq. Cas. 144.

2. This reasoning seems unnecessary. Any conveyance of the legal title by Hall without the consent of Bird was wrongful and McFee not being a *bona fide* purchaser, the doctrine of constructive trusts applied. See *ante* § 84. The case is really one of specific reparation for destroying security. That equity will give specific performance of a contract to give security, see *ante* § 51.

1. See *ante* § 88.

of the purchaser can not be forced to take the property and pay the purchase price, because the vendor has no specific property right in the purchaser's estate, but merely a claim to be paid a sum of money out of the purchaser's general assets. The same principles apply to any other assignee of the purchaser; the contract can not be specifically enforced[2] against him unless he has by contract expressly or impliedly assumed the obligation to pay the purchase price; the assignment passes rights to the assignee but imposes no liabilities. Where the assignee has contracted with the purchaser to assume the purchaser's obligation to pay the purchase price, the vendor stands in the position of a payment beneficiary of such a contract and may as such enforce specific performance.[3]

Tho the vendor cannot get specific performance against the assignees of the purchaser where the assignees do not assume the burdens of the contract he may have the property sold on a foreclosure sale to pay the rest of the purchase money, equity treating him as if he were a mortgagee.[4] This being a property right, the remedy by foreclosure is not barred by the Statute of Limitations applying to the personal obligation of the purchaser.[5]

§ 93. Rights in another's land at common law.

At common law the rights other than legal charges[1] and natural rights[2] which one might have in the land

2. Comstock v. Hitt (1865) 37 Ill. 543, 1 Ames Eq. Cas. 139.

3. See *ante* § 90.

4. The position of the unpaid vendor is always at least as strong as that of a mortgagor, and in some circumstances it is stronger. See *post* § 155.

5. Hanna v. Wilson (1846) 3 Grattan (Va.) 243, 1 Ames Eq. Cas. 142.

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1. See Tiffany, Real Property § 354.

2. Tiffany, Real Property, Chapter XI. The most important natural rights are the right to have the air diffused over one's premises in appromixately its natural condition, the right to have water in

of another, i. e., rights which could be enforced against the land into whosoever hands the land might come, consisted chiefly of easements,[3] profits[4] and covenants running with the land.[5] In order to create them it was necessary that there be an instrument under seal and that they touch and concern the land. The most important easements were those of rights of way, drainage, support of party wall, flowage, and fencing. While an easement is a right or privilege to use the land of another, a profit is a right or privilege to take something from the land of another, such as turf, firewood, pasture, or fish. Covenants running with the land bound only those who succeeded to the estate of the covenantor and could be created only where there was privity of estate;[6] in this connection privity of estate was said to exist where there was an easement or profit or where there was the relation of grantor and grantee or that of lessor and lessee. Most usually, covenants running with the land occurred in leases. The most common ones running with the land against transferees of the lessee were covenants to pay rent, to repair, to rebuild, not to use premises in a certain way and not to assign the lease; those running with the land against the lessor's transferees were covenants to rebuild and covenants to renew the lease. In England, covenants will not run against a transferee except in case of landlord and tenant.[7]

At common law damages were of course all that could be recovered for a breach of a covenant; but if damages were inadequate equity might in a proper case interfere by injunction. But there is a large class

a watercourse flow past one's land without diminution, deterioration or alteration and the right to have one's land supported by adjacent and subjacent land.

3. Tiffany, Real Property, Chapter XII.

4. Tiffany, Real Property, Chapter XIII.

5. Tiffany, Real Property §§ 49, 342, 344. See also 22 Harv. Law Rev. 298.

6. See Tiffany, Real Property § 345.

7. Tiffany, Real Property § 344.

of cases in which there is no primary common law right, in which equity will interfere, thus creating an equitable property right in another's land.

§ 94. Rights in another's land in equity.

In Tulk v. Moxhay[1] the plaintiff, who was the owner of a piece of vacant ground in Leicester Square and also of several of the houses forming the square, sold the vacant piece to one Elms, the deed containing a covenant by Elms[2] that he, his heirs and assigns would keep the piece of ground in its then state, uncovered with any buildings, etc. The piece of land passed by several *mesne* conveyances into the hands of the defendant whose purchase deed contained no similar covenant with his vendor, but he had notice of the original covenant when he made his purchase. The covenant did not run at law against the transferee of Elms because it was not connected with an easement;

1. (1848) 2 Phillips 774, 1 Ames Eq. Cas. 147. Altho Tulk v. Moxhay is the leading case on the subject, the point had already been decided in Whatman v. Gibson (1838) 9 Simons 196. It was a sale of lots under a building scheme and the restrictions were mutual. The court did not say anything about unjust enrichment but merely pointed out the advantage to all the proprietors of preserving the residential character of the neighborhood. The case of Mann v. Stephens (1846) 15 Simons 377, also antedates Tulk v. Moxhay; it varies in facts from Tulk v. Moxhay only in that the assignee entered into a similar covenant with the original covenantor. The reasoning of the court is not reported. Before the decision in Tulk v. Moxhay, a contract not to use land in a particular manner was treated by equity courts in the same way as were other negative contracts; if the plaintiff was so injured in the enjoyment of his own land that damages at law did not furnish an adequate remedy, equity would specifically enforce the contract by granting an injunction against the promisor: Martin v. Nutkin (1724) 2 P. Wms. 266 (promise not to ring a bell); De Wilton v. Saxon (1801) 6 Ves. 106 (not to break up mowing land). The right thus to control the use of property in the hands of the promisor can hardly be classified as other than a property right, but since it was enforcible only against the promisor it was a property right that could be easily destroyed by any alienation of the property and therefore was of relatively small value.

2. As to enforcing the covenant against Elms, see *ante* § 70.

furthermore, there was not only no common law property right, but there was not even a contract right against the defendant because the defendant had made no such covenant with any one. The defendant having manifested an intention to alter the character of the land and having asserted a right to build thereon, the plaintiff sought and obtained an injunction against his doing so. Such a right as equity declared belonged to the plaintiff as against the defendant in this case was formerly called an equitable easement; it is now more common to call it a covenant running with the land in equity. Since such restrictive agreements are recognized by equity as creating property rights in chattels as well as in land, while the common law recognizes no easements or covenants as giving property rights in chattels, it is perhaps better to avoid these terms and call them merely equitable servitudes.[3]

§ 95. Basis of plaintiff's right in Tulk v. Moxhay — unjust enrichment.

The court in Tulk v. Moxhay seemed to rest their decision on the ground that if such a right were not recognized and enforced there would be unjust enrichment at the expense of the plaintiff. Where the parties in the different transactions after the purchase and covenant by Elms supposed that the restriction was binding on transferees and fixed the price of the property accordingly, unjust enrichment of the defendant would result if the restrictions were not enforced against him. And where those same parties supposed that the restriction was not binding on transferees and fixed the price according to that understanding, unjust enrichment would result to the covenantor if the restric-

3. Another objection to calling them covenants running with the land in equity is that if they were treated strictly as covenants equity would not interfere unless there was irreparable damage or at least some damage to the owner of the dominant tenement; on the contrary, no damage at all need be shown in order to get relief. See *post* § 98.

tion is enforced against the defendant. On the other hand, where there is no misapprehension by the parties as to the legal rule, there is no unjust enrichment of any one because the price of the property will be fixed according to the enforcibility or non-enforcibility of the restriction. Consequently the decisions enforcing equitable servitudes against transferees can be rested on the doctrine of unjust enrichment only in the rather abnormal case where the parties were mistaken as to the law. Oddly enough, it has been the orthodox doctrine—now happily disappearing—that equity would give no relief against a mistake of law.[1] At the present day courts usually pay no attention to the question of unjust enrichment in restrictive agreement cases.[2]

A decision which shows that unjust enrichment is not the basis of equitable servitudes is that of Rogers v. Hosegood.[3] In that case it was held that a transferor of the covenantee was entitled to enforce an equitable servitude on the defendant's property tho the plaintiff knew nothing of the restriction when he bought his property.

§ 96. Real basis for plaintiff's right in Tulk v. Moxhay.

The court in Tulk v. Moxhay reasoned in a circle; whether there was unjust enrichment of the defendant at the expense of the plaintiff depended upon the extent of the plaintiff's right; i. e. upon whether the plaintiff could enforce the restrictive agreement against only the covenantor or whether he could also enforce it against the transferees of the land. But tho the reasoning is unsound the decision has been followed with practically no adverse criticism and some other

1. See *post* § 166.

2. Conceivably a restriction might be positively valuable to the purchaser; e. g. if he bought two pieces of land, one of them being subject to a restriction which was of more value to the other piece than it was a detriment to the restricted piece.

3. L. R. (1900) 2 Ch. 388, 1 Ames Eq. Cas. 165.

reason must be found so that it may be fitted in with other parts of the legal system. This reason is found in that the rights in another's property which were recognized and enforced at common law were not adequate to meet modern economic conditions.[1] It is at least doubtful whether such a right could have been created at common law especially in this country where the courts have refused to recognize an easement of light and air by prescription[2] and have been hostile to such an easement even by way of grant. Furthermore, it is practically certain that no such right could have been created at common law with reference to chattels.

A specifically enforcible right that the land of another shall or shall not be used in a certain way is of course a property right and not merely a contract right; and, as in the case of trusts and of specific performance of contracts to sell, equity would naturally be forced into giving relief against transferees who were not *bona fide* purchasers in order to give anything like adequate protection.[3] But the curious thing was that this property right which originated in the giving of specific performance where the legal remedy was not adequate, developed into a technical property right, not dependent in any way upon the rules of specific performance of contracts.[4] Hence equitable servitudes are to be sustained not on the ground of the inadequacy of the common law of contracts but upon the inadequacy of the common law of property.

1. See 28 Harv. Law Rev. 201. Another reason was the almost total lack of governmental supervision of building in Anglo American countries. Tho it might be much better to have municipal control of the use of land than to enforce restrictions imposed by private individuals, such control by private individuals has on the whole been beneficial in the last half century's rapid growth of cities.

2. White v. Chapin (1866) 12 Allen 516; Tiffany, Real Property § 451, p. 1031.

3. See *ante* § 83. See also 21 Harv. Law Rev. 139, 146.

4. This judicial legislation, now recognized to be beneficial, was for the most part unconscious.

§ 97. Who are bound by equitable servitudes.

A common law easement or profit was enforcible against any successor in title tho he paid value in good faith.[1] But like other equitable rights the benefit of an equitable servitude may not be enforced against a *bona fide* purchaser.[2] Tho a common law covenant running with the land was enforcible only against one who succeeded to the estate of the covenantor, there is no such limitation upon the enforcement of equitable servitudes. In Abergarw Brewery Co. v. Holmes,[3] where there was a covenant in a mortgage not to buy wines, beers, etc. from any one except the mortgagee, the restriction was enforced against an under lessee with notice,[4] on the ground that it was the intention of the parties to bind every one claiming under the mortgagor. In order to protect the defendant in such a case, the decree would of course be made conditional upon the mortgagee's complying with his promise to furnish the liquor.[5]

1. Easements and profits are, however, generally required by modern registry acts to be recorded; hence, in the absence of such record a *bona fide* purchaser will be protected. See Armor v. Pye (1881) 25 Kan. 731; Taylor v. Millard (1890) 118 N. Y. 244.

2. Independent of the recording acts common law rights were enforcible against every one while equitable rights were not enforcible against *bona fide* purchasers. But wherever the registry statutes apply there is a new line of division; if the right, whether common law or equitable, is recorded according to the statutory provisions, it is enforcible against all; if it is not so recorded it is not enforcible against *bona fide* purchasers, or attaching creditors. It has been generally held that the registry statutes allow and therefore require the recording of equitable servitudes; where, therefore, they have been properly recorded they are enforcible regardless of actual notice. See 18 Harv. Law Rev. 535.

3. L. R. (1900) 1 Ch. 188, 1 Ames Eq. Cas. 149.

4. If he had not notice, *aliter;* Carter v. Williams (1870) L. R. 9 Eq. 678.

5. See also King v. Dickeson (1889) L. R. 40 Ch. Div. 596, 1 Ames Eq. Cas. 178, where a building line restriction was enforced against one who had bought the premises at a foreclosure sale; Mann v. Stephens (1846) 15 Sim. 377.

It has been long considered as settled that one who obtains title from a trustee by adverse possession is entitled to hold it as against the *cestui que trust* even tho he knew of the trust.[6] On the other hand, one who obtains title by adverse possession of property subject to an equitable servitude does not thereby destroy the servitude even tho he had no notice of it.[7] The only way in which he can get rid of the servitude is by getting a release or by violating it and having the Statute of Limitations run in his favor.[8] The reason for the distinction seems to be this: the holder of the equitable servitude is not interested in the ownership of the servient property but merely in the way the property is used; hence his rights have not been infringed till the property is used in a way inconsistent with the servitude. Or, to state it differently, while it is a breach of trust for the trustee to convey the trust property to any one without the consent of the *cestui que trust* or an order of court,[9] because he owes a fiduciary duty to protect and administer the property for the *cestui*, the holder of property subject to an equitable servitude is not a fiduciary to that extent; he may alien freely except that he must not destroy the servitude by conveying to a *bona fide* purchaser for value.[10]

A fortiori one who has disseised the owner of the servient property but has not yet acquired title is bound by the servitude.[11] On the other hand, while

6. See *post* § 275.

7. *In re* Nisbet and Potts' Contract (1906) 1 Ch. 386, It is not clear whether the court did or did not regard notice as material. It ought not have been regarded as material. See 18 Harv. Law Rev. 608.

8. In this respect the holder of the equitable servitude is treated just as if he had a common law easement or profit.

9. See *post* § 328.

10. His position is very similar to that of the owner of land subject to an equitable charge. See *ante* § 82 and *post* § 260.

11. Mander v. Falcke (1891) 2 Ch. 554. The court mentions the fact that he had notice. Since he has paid nothing for the land it would seem that he ought to be bound even if he had not had notice.

the original covenantor remains liable for violations of the equitable servitude committed by subsequent transferees, a subsequent transferee with notice who does not bind himself by contract with reference to the servitude is liable only for violations while he is owner of an interest in the property; he is liable for infringements by his alienee only if he authorized them.[12]

§ 98. Who may enforce equitable servitudes.

In determining the question as to who may enforce equitable servitudes, equity will usually carry out the intentions of the parties,—either express or as gathered from all the circumstances of the case. While it is usually the intent to benefit a particular piece of land into whosesoever hands it may come, the parties may

12. Hall v. Ewin (1887) 37 Ch. Div. 74, semble. Even before Tulk v. Moxhay there was nothing to prevent a promisor from undertaking to be liable for acts done by his transferee; but at any time it would seem that the promise should not be construed as including such an extensive undertaking in the absence of clear evidence of intent. The mere fact that he promises "for his executors and administrators" ought not to be conclusive because the phrase may have been used as a mere form; his executor or administrator, of course, would be responsible in any event for a breach committed by him while he held the land. In Clark v. Devoe (1891) 124 N. Y. 120, a deed from the defendant of a lot in New York City, after reciting that the grantee was the owner of an adjoining lot, contained a covenant on his part, "for himself, his heirs, executors, administrators and assigns . . . that he will not erect or cause to be erected, on said lot, . . . any building which shall be regarded as a nuisance, or which shall be occupied for any purpose which may render it a nuisance." The defendant conveyed the adjoining lot to X by a deed without any restriction; X erected a building which was used as a livery stable. In an action on the covenant for damages the court held that the covenant should not be so construed as to make the defendant liable for the act of X, because of the "serious result to the grantor with but slight benefit to the grantee." The dictum of the court that the covenant did not create an equitable servitude so as to bind transferees is, however, unsound; instead of requiring clear language to make the restriction enforcible by injunction against transferees, it would and should take clear language to limit the duration of the restriction to the time that the covenantor is owner of the property, because of the comparatively small value of a restriction thus limited.

intend that the restriction be of less duration. In Renals v. Cowlishaw[1] the devisees in trust for the sale of a mansion house and residential property known as the Mill Hill estate and of certain pieces of land adjoining thereto, sold and conveyed two of these adjoining pieces of land to one Shaw who covenanted, among other things, that the property should be used for private dwellings only and not for any trade or business. The conveyance did not state that the covenant was for the protection of the residential property or make any reference to the other adjoining pieces of land. The same trustees also sold other pieces of land adjoining the Mill Hill estate, similar conveyances being made. The trustees later sold and conveyed the Mill Hill estate to Bainbrigge who died and his devisees in trust sold and conveyed to the plaintiff. The pieces of land conveyed to Shaw came by several *mesne* conveyances into the hands of the defendants who carried on the trade of wheelwrights, smiths, and bent timber manufacturers and had erected a high chimney which emitted thick black smoke, thus injuring the residental character of the neighborhood. The plaintiff was refused an injunction on the ground that the restriction was not meant to benefit the property, i. e., the subsequent owners, but merely to benefit the covenantees "to enable them to make the most of the property which they retained."

If the intent of the parties was that the restriction should exist only as long the covenantees should hold the land, the decision seems unimpeachable. But it should be pointed out that to refuse to protect the transferees of the covenantees very largely wipes out the commercial value of the restriction to the covenantees unless the transferee erroneously supposed he would be protected; for if at the time he contracted to buy he knew that he could not as purchaser of the land enforce the restriction, he obviously would pay little, if any, more than

1. (1870) L. R. 9 Ch. Div. 125, 1 Ames Eq. Cas. 159. See also Badger v. Broadman (1860) 16 Gray 550.

if there had been no restriction. The chief value of the restriction therefore is merely to keep the premises free till a sale could be made.[2] On the other hand, if the intent was clear to limit the duration of the restriction to the period of the trustees' ownership of the Mill Hill estate and the purchasers of the lots thus understood it and bargained accordingly, they are entitled to be free from the restriction the moment the trustees convey the property. If the restriction had been thus limited in duration, the lot purchasers might have paid more than they would if the restriction was not so limited but whether they paid more or less has no bearing on the enforcibility of the restriction.[3]

It is to be noted here that tho the servitudes bound transferees of the covenantor, it was only during the time that the covenantees held the property; it was probably not, however, a servitude in gross because it is at least doubtful whether the court would have

2. This might be of sentimental value to the occupants.

3. In the restrictive agreement cases before Tulk v. Moxhay the equity courts based their jurisdiction upon the threatened injury to the promisee's enjoyment of his own land in the vicinity and upon the inadequacy of the common law remedy to compensate for such an injury; and in Tulk v. Moxhay, where the court assumed without argument that they would have had jurisdiction to enjoin the promisor there was such threatened injury. Since Tulk v. Moxhay, however, there has been a change of attitude upon the part of the courts that is none the less curious because probably unconscious. In Peck v. Conway the master found as a fact that the violation of the restriction "would be no appreciable damage or injury to the plaintiff's premises." In discussing this, the court said: "Such an act of the defendants would be against the restriction by which they are bound, and a violation of the rights of the plaintiff, of which she cannot be deprived, because in the judgment of others it is of little or no damage." In other words, the court apparently regarded the plaintiff as being substantially in the same position as if she had bargained for the fee instead of merely for the power to control the use of the land. That is, if she had contracted to buy the fee it would of course be no defense to a suit for specific performance that the plaintiff would be as well or better off without the land; the fact that it is land is a sufficient reason in itself. Similarly, having bargained for a restriction on the land, she is now considered as having bought an interest in the land and the fact that she would not otherwise be damaged if she did not get specific per-

allowed the covenantees to enforce after they had parted with the land.[4] It has, however, been held that an equitable servitude may be in gross; but it would seem that none should be held to be created unless the plaintiff's remedy of damages at law on the con-contract would be adequate.[5] In Vansant v. Rose[6] the plaintiffs, covenantees, were held entitled to enforce a restriction (not to erect a flat) altho at the time of making the contract and at the time of bringing suit they owned no land[7] in the neighborhood and would suffer no damage by the erection of the flat. The argument of the court is that the purchasers presumably paid a less price because of the restriction and therefore the plaintiff ought to be allowed to enforce it to prevent the defendants' being unjustly enriched; and that the plaintiff's motive in creating and attempting to enforce the retriction was of no importance. While this argument seems faulty[8] the decision might conceivably be supported on the ground that the plaintiff

formance is no longer considered important. In other words, she is considered as being the equitable owner of an interest in the servient land from the moment the restriction is intended to become operative.

4. See Harris v. Boots (1904) 2 Ch. Div. 376.

5. In Borough Bill Board Co. v. Levy (1911) 129 N. Y. Supp. 740 the defendant had contracted to the plaintiff bill posting company the exclusive privilege for one year of erecting a signboard on certain lots for bill posting purposes; the defendant later made a similar agreement with another bill posting company who began to tear down the plaintiff's signs and boards. The giving of an injunction here amounted to holding that the plaintiff had a servitude in gross and is supportable on the ground that damages would be conjectural. See 11 Col. Law Rev. 789.

6. (1912) 170 Ill. App. 572, 250 Ill. 401, 103 N. E. 194.

7. In England, common law easements could not be in gross but in the U. S. there has been some tendency to relax the common law rule. Tiffany, Real Property § 305.

8. Suppose the plaintiff had never owned any land at all in the city and paid the defendant $1,000 in consideration for defendant's promise not to erect a flat building on his lot. If the defendant broke his promise the plaintiff could recover only nominal damages on the contract—not being able to prove any loss,—but he could re-

in requiring the covenant and in suing intended to represent and did represent the property owners in the vicinity and the injunction was given to protect them. Nothing of this appears in the case.[9]

While one having an estate in possession in the dominant property can get an injunction without showing any damage to such property,[10] one who has an estate in remainder or reversion after a life estate and is not the promisee must show that the breach would cause injury to his estate in order to get injunctive relief.[11]

§ 99. Equitable servitudes attaching to after acquired property.

In Lewis v. Gollner[1] one Gollner bought a lot in a residential section, intending to erect a tenement building; the plaintiff, representing persons who owned residences in the neighborhood, sought to buy him out and did buy him out, for the sole purpose of saving

cover in quasi-contract $1,000. Would anybody seriously contend that equity should grant an injunction in such a case and thus create an equitable servitude in gross? The actual case of Vansant v. Rose is different only in that the consideration for the restriction is uncertain; is the uncertainty of the amount of recovery in quasi-contract a sound basis for equity jurisdiction? If the plaintiff could show that there was a real deduction made in price it would seem that he ought to be able to recover in quasi contract for the amount of the deduction.

9. The decision is an example of the tendency in this country of equity to become mechanical. See *ante* § 15.

10. Dickenson v. Grand Junction Canal Company (1852) 15 Beav. 260.

11. Johnstone v. Hall (1856) 2 Kay & J. 414, 1 Ames Eq. Cas. 187. This is analogous to common law protection of property rights; a person in possession may bring trespass for a violation of the possession and recover judgment without proving any damage; the remainderman must bring an action on the case and prove actual damage in order to recover. If the remainderman were also the promisee, he would not, of course, be under the necessity of showing any such damages if Vansant v. Rose, *supra* should be followed.

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1. (1891) 129 N. Y. 227; 29 N. E. 81; 1 Ames Eq. Cas. 152.

the neighborhood from flats. The plaintiff paid Gollner $6000 more than Gollner had agreed to give for the lot, the latter agreeing that "he would not construct or erect any flats in plaintiff's immediate neighborhood or trouble him any more." Immediately afterward Gollner bought a lot diagonally opposite his first purchase and began erecting a seven-story flat. The plaintiff's attorney threatened action and one of the materialmen refused to continue to supply him further, so Gollner sold and conveyed the premises to his wife who took with knowledge of all the facts and with the intention of protecting her husband. The plaintiff sought an injunction against Gollner and his wife; the lower court refused to give it but this was reversed by the upper court. It is to be observed here that at the time the contract was entered into, the defendant Gollner had no land to which an equitable servitude could attach and consequently there was, strictly speaking, no equitable servitude at that time. The court seemed to think that the contract created such a situation between the parties that an equitable servitude came into existence the moment that Gollner acquired a piece of land in the immediate neighborhood and would therefore be enforcible against a purchaser of the land with notice of the facts. This is somewhat analogous to the creation of a trust of after acquired property.[2] The actual facts of the case did not require such reasoning; it was clear that Gollner's wife was colluding with him to help him escape the consequences of his contract and even if the obligation of Gollner be considered as merely personal, damages at law being inadequate, the court properly enjoined the wife as well as Gollner. But if Gollner transferred to a stranger who had no intent to aid Gollner to evade his contract but did know the facts, such a transferee could be enjoined only on the ground suggested by the court.

2. See *post* § 269.

§ 100. Restrictive agreements as to a business.

Tho the great bulk of equitable servitudes consist of restrictions placed on one piece of land, for the benefit of another piece of land, they may be imposed for the benefit of a business and if so intended the benefit will pass to the assignee of the business.[1] Similarly, the benefit of a personal covenant not to compete with the promisee in business will pass to the assignees of the promisee, if so intended.[2] On the other hand, the restriction may be enforced against the assignees of the covenantor's business. In Wilkes v. Spooner,[3] X sold to the plaintiff his business of general butcher, covenanting not to establish a rival business within three miles. X also conducted a pork business at a nearby shop which he held on lease. This lease X surrendered in order that his son, the defendant, who bought the pork business with notice of this covenant, might get a new lease and set up a business to compete with the plaintiff's. The real reason for enjoining the defendant was that he was the assignee of the father's business—not that he happened to occupy the same building; tho the court seemed to put it on the latter ground, it is difficult to see how X, having only a term for years, could create an equitable servitude on the land which would outlast his lease.

§ 101. The formality essential to the creation of equitable servitudes.

Altho equitable servitudes are treated as technical

1. Abergarw Brewery Co. v. Holmes (1900) L. R. 1 Ch. 188, 1 Ames Eq. Cas. 149.

2. Francisco v. Smith (1894) 143 N. Y. 488, 38 N. E. 980, 1 Ames Eq. Cas. 186. As the court pointed out, since the benefit of the covenant passed to the assignee of the business, no injunction can be granted if the business is discontinued; but a discontinuance does not put an end to the right but merely suspends the enforcement, so that if the business is later resumed the covenantor can then be enjoined. See also Clegg v. Hands (1890) L. R. 44 Ch. Div. 403; Catt v. Tourle (1869) L. R. 4 Ch. App 654.

3. (1910) 24 L. T. R. 157, (1911) 2 K. B. 473, 24 Harv. Law Rev. 574.

property rights,[1] no particular formality is required for their creation. Thus not only is a seal not necessary,[2] but there is a conflict of authority as to whether any written memorandum at all is necessary to comply with the Statute of Frauds.[3] Furthermore, it is not important whether the restrictions take the form of covenants,[4] reservations, or conditions.[5]

But altho form may not be essential, it is as a practical matter very important in drawing up instruments containing restrictions, that express stipulations be made. If the covenantee wishes to make certain that his transferees may take advantage of the restriction, the safest way is to have an express provision in the deed that it is for the benefit of the land; if he fails to do this, it will then become a question of construction for the court. In Tallmadge v. East River Bank[6] it was held that if the sale was made with reference to a plat showing the restriction, that was enough. And in Peck v. Conway[7] and Barrow v. Richard[8] it was decided that if on a fair construction of the whole instrument an intention to benefit the land appeared, that was sufficient.[9] If the seller intended to sell all the property and not retain any himself,

1. That is, they are enforced tho the plaintiff would suffer no damage to other land by breach. See *ante* §§ 96, 98.

2. Dorr v. Harrahan (1869) 101 Mass. 531.

3. See Browne, Statute of Frauds (4th ed.) § 269; but see 5 Harv. Law Rev. 278: "If the acts and the land are stated in writing, the court considers the statute satisfied, and will gather the other terms of the restriction by reading the writing as a whole in the light of surrounding circumstances."

4. Peck v. Conway (1871) 119 Mass. 546, 1 Ames Eq. Cas. 162.

5. Parker v. Nightingale (1863) 6 Allen 341, 5 Harv. Law Rev. 277; Barrow v. Richard (1840) 8 Paige 351, 1 Ames Eq. Cases 173.

6. (1862) 26 N. Y. 105.

7. (1871) 119 Mass. 546, 1 Ames Eq. Cas. 162.

8. (1840) 8 Paige 351, 1 Ames Eq. Cas. 173.

9. 5 Harv. Law Rev. 278: "The ownership and character of buildings in the neighborhood, plans, building schemes, the existence of similar restrictions upon other lots, even parol agreements among neighbors may be shown as bearing upon the probable intention of the contracting parties."

this fact tends strongly to show that the restriction was meant to benefit the future owners of the land.[10]

§ 102. Whether equitable servitudes may require affirmative action.

With the exception of the spurious common law easements of fencing,[1] common law easements require no action on the part of the owner of the servient property. An equitable servitude, on the other hand, may impose a duty to act tho the court may as a practical matter refuse relief.[2] If the act is of such a nature as to require little or no supervision, enforcement will be decreed, e. g. in Whittenton v. Staples,[3] where the covenant was to pay the grantor or assignee one fifth of flowage damages caused by a reserve dam. On the other hand, if the act is such as to require a great deal of supervision, equity will usually refuse relief as a matter of the balance of convenience unless the hardship on the plaintiff would be very great if relief were denied.[4]

10. See the discussion of mutual covenants *post* § 103; Nottingham Company v. Butler (1886) L. R. 16 Q., B. D. 778, 1 Ames Eq. Cas. 169.

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1. Tiffany, Real Property § 312.

2. Because of the difficulty of supervision and the interference with the personal liberty of the defendant. It is a question to be decided as a matter of the balance of convenience. See *ante* § 62. See also 5 Harv. Law Rev. 278, 279.

3. (1898) 164 Mass. 319. See also Atlanta K. & N. Ry. Co. v. McKinney (1906) 124 Ga. 929, 52 S. E. 701, in which a covenant to convey water to the covenantee's residence was enforced against the covenantor's assignees. See 14 Harv. Law Rev. 301 (contract to keep water wheel in repair). In Clegg v. Hands (1890) 44 Ch. Div. 503, a covenant by a lessee to buy beer only of the lessor was indirectly enforced in favor of the lessor's assignees by enjoining the lessee from buying beer elsewhere. It thus combines the peculiar principles of both Tulk v. Moxhay and Lumley v. Wagner; see ante § 72.

4. Haywood v. Brunswick Building Co. (1881) 8 Q. B. D. 403, 1 Ames Eq. Cas. 176 (covenant to keep in repair not enforced against assignee).

§ 103. Mutual covenants in general building schemes.

Another illustration of the non-technical way in which equitable servitudes may be created is shown in the rules applying to mutual covenants in general building schemes. In Nottingham Brick and Tile Co. v. Butler[1] thirteen lots were put up at auction, subject to certain sale conditions as to the use of the land which were also expressed in the deeds of conveyance to the various purchasers. It was held that since the grantor intended to sell and did sell the whole property, the restrictions were evidently meant to benefit each lot as against all the others, and equity would effectuate this intention.[2] In Barrow v. Richard,[3] it did not appear that the vendor intended to sell all his property in the vicinity, but in each of the conveyances which he made there was included a condition against the property being used for "any manufactory, trade or business which should or might be in any wise offensive to the neighboring inhabitants." This was held to be sufficient to show an intention to benefit each of the lots[4] sold against the others. The court in this case admitted that the plaintiff could not recover at law;[5] and it must be admitted that it would have been difficult if not impossible to have worked out any principle at common law which would allow the purchaser of the lot first sold to enforce against a purchaser of another lot a covenant which was not in existence at the time of

1. (1880) L. R. 16 Q. B. D. 778, 1 Ames Eq. Cas. 169.

2. The facts that the lots were not sold on the same day and that some were later sold at private sale were held to be unimportant since it was a general scheme. See Collins v. Castle (1887) L. R. 36 Ch. Div. 243.

3. (1840) 8 Paige 351, 1 Ames Eq. Cas. 173.

4. As to whether other "neighboring inhabitants" not purchasers from the vendor, might enjoin as expressly intended beneficiaries of the contract, *quaere;* see *ante* § 90.

5. This was before the famous case of Lawrence v. Fox (1859) 20 N. Y. 268, but it is least doubtful whether the present New York law would regard the plaintiff as coming within the principle of that case.

the sale of the first lot. Equity, however, is able to and does carry out the intention of the parties by allowing the purchaser of any lot to enforce the restriction against the purchaser of any other lot.[6] In such a building scheme, however, each lot is treated as a unit; hence, if it is later divided one part of the lot cannot enforce against the other part;[7] but each part may enforce the restriction against any other lot or part thereof or *vice versa*.

While it seems to be an unsettled question whether in the ordinary case a covenant will bind after acquired property of the covenantor,[8] it has recently been held in a general building scheme case that after acquired property may be bound at least in the hands of a transferee. In Schmidt v. Palisade Supply Co.,[9] X, the owner of land projected a definite building scheme, including in his project land to which he had no title.

6. See 6 Harv. Law Rev. 290; 12 Col. Law Rev. 159. In Child v. Douglass (1854) Kay 560 it is suggested that the later purchasers are assignees from the vendors of the benefit of the covenants made by the earlier purchasers; but this does not explain the obligation of the later purchasers to the earlier. In Parker v. Nightingale (1863) 6 Allen 341 it was held that since the vendor was only a dry trustee of the covenants for each of the purchasers he need not be joined. The purchasers would seem to be beneficiaries of the contract rather than *cestuis que trust* however. That mutual covenants may exist without a sale but merely by agreement between two owners of neighboring property, see Trustees of Columbia College v. Lynch (1877) 70 N. Y. 440, 16 Mich. L. Rev. 102, note 56. Tho equitable servitudes have grown out of the specific performance of contracts it may be questioned whether it is at the present time necessary for the existence of equitable servitudes, that there be any common law contract right against any one. For example, if A has only ten lots and he sells them all at one auction according to a building scheme it is at least doubtful whether there is any personal liability on any one. If there is not, then the situation is analogous to a conveyance of land with a reservation of a common law easement or of a rent charge.

7. King v. Dickeson (1889) L. R. 40 Ch. Div. 596, 1 Ames Cas. 178; Barney v. Everard (1900) 67 N. Y. Supp. 535. See 7 Col. Law Rev. 623.

8. See *ante* § 99.

9. (1912) 84 Atl. 807 (N. J.); 13 Col. Law Rev. 77.

He later acquired this land and conveyed a part of it to the defendant, subject to the restrictions of the general plan. It was held that a purchaser of part of the land originally owned could enforce the restriction against the defendant.[10]

§ 104. Failure of purpose of restriction.

Tho the plaintiff may get an injunction without showing damage, he may be refused preventive relief where it is not possible thereby to secure to the plaintiff the benefit intended. In Jackson v. Stevenson[1] lots had been sold in 1865 under a general building scheme with restrictions against the use of the lots for trade or business purposes. After 1873 the character of that portion of the city changed from a residential to a business district. In 1891 the plaintiff sought an injunction but was refused because the court's decree could not restore the residential character of the neighborhood, and would therefore be practically futile.[2]

10. It is an interesting question whether X himself would be bound by the general restrictions as to the after acquired land. There seem to be no cases.

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1. (1892) 156 Mass. 496, 1 Ames Eq. Cas. 179. See also McClure v. Leaycraft (1905) 183 N. Y. 36, 19 Harv. Law Rev. 305; and Columbia College v. Thacher (1882) 87 N. Y. 311 where the change had come about after suit was brought but before decree.

2. The court, however, did not dismiss the bill but retained it for the sake of assessing damages. This is to be justified only upon the ground that the servitude has not actually come to an end but that it is merely unenforcible because of practical difficulties. The court in McClure v. Leaycraft, *supra*, seemed to proceed upon the same theory in suggesting that the plaintiff could recover damages at law. It is difficult to understand this last suggestion because the defendant was not the original covenantor but a purchaser from him, but it is understandable to allow the plaintiff a sum of money in equity as compensation for an equitable property right which the equity court in its discretion refuses to enforce. In Amerman v. Deane, (1892) 132 N. Y. 355 30 N. E. 741, the trial court having awarded $1,500 in lieu of an injunction the upper court ordered that the plaintiff should not get the amount unless she executed to the defendant a release of the servitude.

§ 105. Public policy against enforcing restriction.

A contract not to compete with the promisee may be invalid at law and therefore not enforcible in equity because contrary to public policy in favor of freedom of competition.[1] For the same reason a court of equity may refuse to enforce an equitable servitude. In Norcross v. James,[2] one K conveyed to F a quarry, retaining the surrounding land. In the conveyance there was a covenant not to open any quarry on the land retained. The plaintiff, a subsequent transferee of the quarry, sought to have the covenant enforced against a subsequent transferee of the surrounding land. Relief was refused on the ground that it would tend to create a monopoly for the plaintiff. Whether, however, the restriction is against public policy ought to be determined on the facts of each case; there is nothing in the report of the case to show that the restriction would injure the public,[3] tho that might have been the fact; e. g. if the stone were a peculiar sort which the public could not easily get on the market. If, however, the stone were quite common and easily procured by the public, there would seem to be no satisfactory reason for refusing relief.[4]

§ 106. Equitable servitudes upon and for the benefit of chattels.

It may be very important for the vendor or lessor of a chattel to impose restrictions upon the use of the

1. See *ante* § 68.

2. (1885) 140 Mass. 188, 1 Ames Eq. Cas. 182.

3. In Burdell v. Grandi (1907) 152 Cal. 376, 92 Pac. 1022, the owner of a large tract of land divided it into lots and conveyed them to different purchasers by deeds containing covenants by the vendors not to sell intoxicating liquors; the purpose was to protect his own saloon from competition. The covenants were held void as creating a monoply. See 21 Harv. Law Rev. 450. See also Brewer v. Marshall (1868) 19 N. J. Eq. 537.

4. In the very similar case of Hodge v. Sloan (1887) 107 N. Y. 244, 17 N. E. 335, 1 Ames Eq. Cas. 184 relief was given; the question of monoply seems not to have been raised.

chattel in the hands of the lessee and his assignees or upon the sale of it in the hands of the purchaser and his assignees. A few cases have enforced such restrictions, thus carrying out the intent of the parties. In Murphy v. Christian Press Association Publishing Co.[1] the plaintiff bought of the Catholic Publication Society a set of electrotype plates, convenanting that it would not sell plates to any one else, and that it would not sell books at less than a certain price. Later the society was dissolved and the receivers sold the plates to the defendant who knew of the agreement. The defendant published and sold books at a less price than the society had agreed to sell; the plaintiff was granted an injunction. Here the covenantee was not the business because the defendant did not buy out the business but merely the plates and copyright, so that the dominant property here was the plates sold and the servient property was the plates retained. It is to be observed that the chattels involved here were protected by the copyright law; it is also held that the price of patented articles may be similarly controlled.[2] It was for a while contended[3] that the same rule should be applied to proprietary articles such as so called patent medicines where there was a trade secret involved; but the present tendency is in favor of holding restrictions in such cases invalid.[4] Where neither statutory not natural monopoly is involved the public interest in free trade in chattels would *a fortiori* prevent the upholding of such restrictions.

1. (1889) 38 N. Y. App. Div. 426, 1 Ames Eq. Cas. 157. See also New York Bank Note Co. v. Hamilton Bank Co. (1895) 83 Hun 593; 20 Harv. Law Rev. 335.

2. See Park and Sons Co. v. Hartman (1907) 153 Fed. 24 and cases cited.

3. See 17 Harv. Law Rev. 415.

4. Dr. Miles Medical Co. v. Park and Sons Co. (1911) 220 U. S. 373; 25 Harv. Law Rev. 59-69; "Price Restriction on the Resale of Chattels," by William J. Shroder. Mr. Shroder's argument is that while the protection of the statutory monoply of the patentee and copyright owner extends to the chattels produced thereunder, the natural

§ 107. Effect of plaintiff's default or acquiescence.

Like other incorporeal property rights, an equitable servitude may be released by the owner of the dominant property and thereby extinguished;[1] whether the failure of the purpose of a restriction puts an end to the right or merely to the plaintiff's equitable remedy thereon has already been discussed.[2] A plaintiff may, of course, be estopped by observing without objection the defendant's expenditure of money in violating the restriction, tho it is at least doubtful whether this would bar the plaintiff from objecting to further violations.[3] Where the restrictions are mutual a plaintiff may be barred because he has himself violated the restriction upon his own land;[4] and where a landlord imposed building restrictions upon several tenants for their mutual benefit as well as his own and so failed to enforce them against some of the tenants that the object of the restrictions was defeated it was held that he had lost the power to enforce against others.[5] While mutual restrictions may come to an end by mutual abandonment, a modification of the restrictions may be made by all the parties without extinguishing the restrictions.[6]

monoply of the possessor of a secret exists only as long as the secret is preserved and has no relation to the article manufactured by its use when once it is offered as a subject of commerce; that while the owner of the statutory monoply gives the benefit of his discovery to the public after a certain period, the owner of a trade secret gives nothing to the public for his protection against fraudulent discovery or disclosure.

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1. Tiffany, Real Property § 275.

2. See *ante* § 104.

3. Whitney v. Union Ry. Company (1858) 11 Gray 359.

4. Coates v. Collingford (1911) 131 N. Y. Supp. 700; 12 Col. Law Rev. 158.

5. Roper v. Williams (1822) Turn & R. 18. See also Ocean City Ass'n v. Chalfant (1903) 65 N. J. Eq. 156, 55 Atl. 801 (restrictions against trade or business on Sunday); 17 Harv. Law Rev. 138; 4 Col. Law Rev. 73.

6. See Sanford v. Keer (1912) 80 N. J. Eq. 240, where it was held that building a garage on that portion of the lot intended for a dwel-

E. Consequences of Right of Specific Performance.

§ 108. Devolution of purchaser's rights and obligations.

At common law the rule for the devolution of the assets of an intestate was that the real property—which included all interests in land except terms for years—went to the heir, while personal property—which included everything else—went to the executor to pay debts and to distribute to the next of kin.[1] Since the heir and next of kin are not necessarily the same person or persons, it often becomes important to determine whether the intestate's assets are to be treated as realty or personalty. There being no occasion for a different rule of devolution of equitable interests, equity followed the law on this point, not only with respect to common law property rights but also as to equitable property rights.

As already explained,[2] the purchaser under a contract for the sale and purchase of property which is specifically enforcible[3] against the vendor has not only a contract right but an equitable property right from the moment the contract is made; provided, of course, that the vendor at that time owns the property; if he did not then own it but expected to procure it, the property right could not arise till it was procured. And if the purchaser dies before it is procured, he leaves

ling house was not protected by a modification allowing necessary or desirable outbuildings.

1. Tiffany, Real Property § 425. In the very early common law the executor apparently kept what was left after payment of the debts.

2. See *ante* § 83.

3. If the contract is for any reason not specifically enforcible by the purchaser no property right arises even though for some purposes the contract may be treated as valid. In Buckmaster v. Harrop (1802) 7 Ves. 341, the contract was oral; specific performance was denied to the heir of the purchaser although it appeared that the vendor was willing to convey and that the purchaser would probably have carried out the contract if he had lived long enough to do so.

only a contract right which passes to his executor as a part of his personal assets.[4]

If, however, at the time of the purchaser's death the vendor has the legal title to the property and the property consists of realty, the purchaser's equitable property right passes to his heir who may enforce[5] it to the exclusion[6] of the contract right which goes to the executor. Hence, any attempt by the vendor and the executor of the purchaser to rescind the contract will have no effect upon the rights of the heir.[7]

The proper remedy of the heir is to bring a bill against the vendor asking for a reconveyance, joining the purchaser's executor in the suit so as to compel him to pay for the land out of the personal assets of the decedent's estate.[8]

Since the equitable property interest passes to the heir upon intestacy, the right may be devised;[9] and the rights of the devisee are exactly the same as the

4. Green v. Smith (1738) 1 Atkyns 572, 1 Ames Eq. Cas. 193.

5. The effect of such enforcement by the heir would be the extinction of the contract right; but if for any reason the heir chooses not to enforce it, there would seem to be no reason why the executor might not recover damages against the vendor for breach of contract, subject, of course, to the possibility of the vendor's enforcing specific performance, if not barred therefrom.

6. Wherever the equity rule or right came into conflict with the common law rule or right, the former always prevailed; and such is the express provision of the English Judicature Act. In this country the reverse has sometimes unfortunately happened. See 5 Col. Law Rev. 20-35, The Decadence of Equity, by Roscoe Pound.

7. See Matthews v. Gadd (1871) 5 South Australia Law Reports 129, 1 Ames Eq. Cas. 193. In that case the heir did not insist upon specific performance but it was held that he was entitled to an amount equal to the purchase money which would have been paid for the land. He could be entitled to this only if he was entitled to specific performance.

8. Milner v. Mills (1729) Moseley 123, 1 Ames Eq. Cas. 191.

9. Since real property acquired after the execution of a will does not pass by the will in the absence of statute, the heir and not the residuary devisee is entitled to land bargained for by the testator after his will was executed; Langford v. Patt (1731) 2 Peere Wms. 629.

rights of the heir[10] would have been if the property right had been allowed to descend.[11]

If after the purchaser's death it is the vendor who seeks specific performance, the party to be sued primarily is the executor, since the obligation to pay the purchase money devolves upon him and not upon the heir or devisee; the heir or devisee should, however, be joined so that he can be in an advantageous position to insist upon getting a good title and also because, in case the personal estate should be insufficient to pay the purchase price, he can have an opportunity to make up the deficiency out of his own pocket.[12]

§ 109. Devolution of the vendor's rights and obligations.

Under a contract for the sale and purchase of property which is specifically enforcible against the purchaser, the vendor has two contract rights; one is to sue the purchaser at common law for breach if he refuses to perform; the other is to compel the purchaser to pay the full purchase price and take the property. During his lifetime the vendor may choose which right he will enforce and the enforcement of either will extinguish the other—subject, however, to

10. Either the heir or the devisee must bring suit, not the administrator, unless enabled to do so by statute. See Buck v. Buck (1844) 11 Paige 170.

11. If after the purchaser's death the vendor should sell and convey the land to a *bona fide* purchaser and thus destroy the property right of the purchaser's heir, it would seem that the latter should recover from the executor the amount of the purchase money which the executor could have been compelled to pay to the vendor for the land if there had been no such wrongful sale; it would seem that he ought also to be entitled to whatever damages the executor may be able to collect from the vendor for breach of contract, or he might be able to recover from the vendor the excess, if any, which the vendor received for the land beyond the contract price. If, however, the sale by the vendor to the *bona fide* purchaser took place before the purchaser's death the heir will not be entitled to anything because at the time of his death the purchaser had no equitable property right in the land but only a right of action for damages.

12. Townsend v. Champernoune (1821) 9 Price 130.

the possibility that the purchaser may demand specific performance against the vendor if there is no bar to such enforcement. Upon the death of the vendor both rights pass to the executor who has a similar choice. If he chooses to enforce specific performance he may do so despite any attempt by the vendor's heir and the purchaser to rescind the contract. His proper remedy is to sue the purchaser for the payment of the purchase money, joining the heir of the vendor in the same suit so as to compel conveyance of the land.[1]

Where the contract is specifically enforcible against the vendor he is treated by equity as a fiduciary[2] of the land from the moment of contract, holding the legal title merely by way of security for unpaid purchase money. Where the contract is specifically enforcible by the vendor but not, for some reason, specifically enforcible against him, he does not become a fiduciary of the land, tho of course, he must convey it in order to get the purchase price. But upon the vendor's death in the latter case, the heir of the vendor becomes a sort of fiduciary for the vendor's executor because the executor can compel specific performance, and force him to convey to the purchaser, and it has even been held that where the purchaser is barred by laches from getting specific performance, the executor may claim the land from the heir without forcing the purchaser to take it.[3] On the other hand, if the contract is specifi-

1. Bubbs' case (1678) Freeman, Chancery Cases 38, 1 Ames Eq. Cases 194. In that case the court gave a decree for the purchase money without having a conveyance made by the heir; but the purchaser might have insisted upon having the heir made a party and upon a conveyance by him. Roberts v. Marchant (1843) 1 Phillips 370. If the vendor has devised the premises the purchaser may insist that the devisee be made a party. Coles v. Feeney (1894) 52 N. J. Eq. 493, 29 Atl. 172.

2. His fiduciary obligation is not so serious a matter as to make wrongful a conveyance of the land and the right to the purchase money to a donee or to a purchaser with notice; in this respect he is like a mortgagee, not a trustee.

3. Cure v. Bowyer (1819) 5 Beav. 6, note (b), 1 Ames Eq. Cas. 196. This doctrine rests upon the principle that the rights of the heir and

cally enforcible against the vendor but not by him, because of the failure of title to some part, and the purchaser fails to enforce specifically, the vendor's heir is entitled to keep the land because at the vendor's death the vendor had no right to the purchase money.[4]

Where the contract fixes a time in the future for the transfer of title and possession and the payment of the purchase money, the vendor is entitled to the rents and profits until the time for performance has arrived.[5] If at the time for performance the purchaser is put into possession but does not get title, he may keep the rents and profits but must pay the purchase money or

executor respectively should not be determined by what the purchaser does or does not do. The same principle underlies the doctrine of marshalling of assets. See *post* § 454.

4. Thomas v. Howell (1886) L. R. 34 Ch. D. 166, 1 Ames Eq. Cas. 196.

5. Lumsden v. Fraser (1841) 12 Simons 263, 1 Ames Eq. Cas. 220. A practical reason for this is that since the purchaser does not pay interest on the purchase money during the period, he ought not to be entitled to the rents and profits.

In this respect the analogy of the vendor to trustee and mortgagee both fail; if the vendor were really a trustee he would be accountable to the purchaser for the rents and profits; if he were a mortgagee, he could be compelled to apply them upon the purchaser's debt. The situation really is that although equity was compelled, in order to protect the purchaser, to hold that his property right and therefore the vendor's fiduciary obligation arise at once, the property right may be postponed in enjoyment, similar to the right of the holder of an executory devise or shifting use. See *ante* § 83.

In Lysaght v. Edwards (1876) L. R. 2 Ch. Div. 499 the court speaks of the vendor as being "a constructive trustee for the purchaser of the estate from the moment the contract is entered into;" and this was adopted by Professor Keener in 1 Col. Law Rev. 1, 6. The usage is objectionable because the obligation of the vendor to convey is in no sense constructive; that is, the obligation is consensual, while a constructive obligation is properly one which the law imposes upon a party irrespective of and usually *contra* to his intent, as in the case of property obtained by fraud or mistake. The obligation of the vendor to convey upon the purchaser's paying or securing the purchase price according to the terms of the contract exists at common law as well as in equity; the difference between common law and equity here consists primarily in that the common law gives only damages by way of redress.

interest thereon.[6] If through default of the vendor the purchaser is not even put into possession, the purchaser should have the choice of either paying no interest till he gets possession or title or of paying interest and making the vendor account for the rents and profits.[7]

If the contract fixes a time for performance in the future—say at the end of two years—and the vendor dies before the expiration of the time set, the rents and profits for the remaining time go the heir.[8] In thus holding equity is following the law, because if the conveyance of the legal title had been made by bargain and sale to take effect at the end of two years, the rents and profits for the two years would go to the heir on the ground that it was merely a continuation of the estate which the vendor already had and therefore a part of the fee.[9]

If after the death of the vendor it is the purchaser who seeks specific performance, his suit will primarily be brought against the vendor's heir; but the executor should also be joined[10] because the money is to be paid to him and only he can give a proper receipt therefor to the purchaser.[11]

6. Minard v. Beans (1870) 64 Pa. 411, 1 Ames Eq. Cas. 217. If he wishes to avoid paying interest but also wishes to avoid paying the purchase money till he gets the title, he can escape paying interest by making a permanent tender of the purchase money in a bank and notifying the vendor. Howland v. Norris (1784) 1 Cox 259.

7. Blount v. Blount (1748) 3 Atk. 836; Powell v. Martyr (1803) 8 Ves. 146, note.

8. Lumsden v. Fraser (1841) 12 Simons 263, 1 Ames Eq. Cas. 220.

9. Leake's Digest of Property Law 352.

10. Potter v. Ellice (1872) 48 N. Y. 321.

11. In discussing these cases the phrase "equitable conversion" has been carefully avoided. Though it is much used in the decisions and text books, it has only tended to confuse the subject. At best it is only a result and not a cause. The really important question in the devolution cases is: what rights did the purchaser have at the moment of death? See 13 Col. Law Rev. 369-388 Equitable Conversion by Contract by Harlan F. Stone. For a discussion of equitable conversion see *post* § 448.

§ 110. Devolution of equitable real property rights created in contracts to build.

According to the more recent decisions a contract to erect a building on one's own land will not be specifically enforced against the builder.[1] An early English case,[2] however, held that if the owner dies before the house is built, "the heir may compel the builder to build it and the father's executor to pay for it." It is at least likely that at that time[3] the ancestor himself could have obtained specific performance, so that the court did not place the builder in a different position from that which he occupied before the owner's death. Assuming that the father could have had specific performance, it is obvious that such a right would not pass to his executor but to his heir because the performance of the contract would result in a benefit to the land which would, of course, pass to the heir. The giving of the remedy of specific performance to the ancestor by equity therefore created in the ancestor an equitable real property right to have a house built upon the land out of materials furnished by the builder; and this equitable real property right passed to the heir along with other real property rights. It is to be observed that this right is the converse of a profit in gross in fee; the latter is an inheritable right to get a benefit from land but not appurtenant to other land; the former is a right to have a benefit added to land by the labor and materials of a builder, but not in any way connected with the builder's land.

1. On the ground of difficulty of supervision and the comparative futility of the decree. See *ante* § 59.

2. Holt v. Holt (1694) 1 Eq. Abridg't 274, pl. 11, 1 Ames Eq. Cas. 68.

3. In early times Chancery was quite liberal in granting specific performance of contracts to build on the plaintiff's land; the buildings involved were probably much simpler than those required by the average modern contract, and the task of supervision was therefore not so great. See 10 Col. Law Rev. 574; 1 Ames Eq. Cas. 68, note 4. If the ancestor could not have obtained specific performance, it is difficult indeed to see any possible ground for the heir to get it.

Now that such contracts are not usually specifically enforcible against the builder by the ancestor for the reasons already given, it would seem clear that the accident of the ancestor's death should not take away the builder's defense. But has the change in the rule entirely wiped out the equitable property right of the ancestor and heir, or does it still exist but with other means of enforcement? It is as least arguable that the change by the equity courts in the way in which they exercise their discretion ought not to have the effect of destroying an equitable property right even though the right does, of course, owe its existence to the fact that at an earlier date courts of equity did give specific performance in such cases. At any rate, there are two fairly modern cases which are difficult to explain except on this assumption. In Cooper v. Jarman[4] the administrator had paid the builder for the finishing of the house after the intestate's death and it was held to be a proper payment.[5] And in Sprake v. Day[6] it was held that the devisee could insist that the administrator pay for finishing the house.[7] If the builder were unwilling to finish it, this should not affect the substantial rights of the devisee; he should be entitled to have the

4. (1866) L. R. 3 Eq. Cases. 98.

5. The chief argument of the court was that to hold otherwise would place the administrator in an embarrassing position. "The administrator could not safely pay the amount of damages claimed by the contractor for the loss sustained by breach of the contract. If he did, the next of kin might successfully say that he paid more than a jury would have allowed, and if he resisted and went to trial at law, and thereupon the amount of damages found by the jury, together with the costs of the suit should exceed the amount to be paid for the completion of the contract, could the legal personal representative be allowed to deduct this in taking the accounts?"

6. (1898) 2 Ch. Div. 510. These seem to be the only modern English cases and there seems to be no American case.

7. That the real explanation is that given in the text and not the explanation of the court in Cooper v. Jarman is shown by the other part of Sprake v. Day, The testator had also contracted with the same builder to build some houses on other land already belonging to the devisee; it was held that the devisee—being a volunteer—

sum paid to any other builder whom he chooses, to finish it; or to himself if he prefers to have the money rather than the building, according to what is usually called the doctrine of equitable reconversion. And while in Sprake v. Day *supra* the work had already been begun by the builder, it would seem that that fact should be held immaterial.

§ 111. Options—devolution of option holder's rights.

Where a specifically enforcible express option to buy has been exercised by acceptance before the death of the option holder, the situation arising is similar to that already discussed.[1] If, however, he dies before exercising the option and also before the period for exercising the option has elapsed, does the right to exercise it go to his heir or to his executor? There are two plausible[2] solutions: (1) Let the heir exercise the option and if he accepts, let him get the land, he paying the purchase price. (2) Let the executor exercise the option, and if he accepts, let him get the land, he paying

was not entitled to have the contract carried out by the administrator. Since the devisee did not obtain from the will any property right to this land or to these houses and since in England a sole beneficiary of a contract has no right, either at law or in equity to complain of its nonperformance the decision seems the only logical one. But it is to be observed that the administrator may be compelled by the builder to pay damages for breach unless the devisee is willing to assume the burdens of the contract by paying for the houses.

1. See *ante* § 108.

2. There are two other possible solutions, neither of which can be called plausible. If the heir were allowed to exercise the option and compel the executor to pay the purchase price, such a holding would be open to two objections; first, he would practically always exercise the option by acceptance and hence it would really cease to be an option; and, secondly, the decedent never having become liable for the purchase money it would be difficult to see how the executor could be made liable. If the executor were allowed to exercise the option and required, in case of accepting, to pay the purchase price but the heir to get the land, such a holding would be open to the objection that the executor would practically never exercise it by acceptance and it would therefore cease to be an option.

the purchase price. Since the option holder at the time of his death had just as much *right*[3] to get the land[4] as if he had already exercised the option by acceptance, it would seem that the right should pass to the heir. If it is worth accepting, it is in substance a right to get land at a desirable price;[5] and such a right seems to savor just as much of realty as if the option holder had accepted the option before his death.[6]

Where the option to buy is due to the failure of a vendor to make a good title to all the land which he

3. Tho, of course, under no *obligation* with respect thereto. To be sure, if the option holder accepts, his right to get the land is likely to be of longer duration than is the right given by the option, but the right itself is no greater.

4. It may be urged here that he also had a right to keep his money and not buy the land; but he would ordinarily keep only in case the option was not worth being accepted. If it is worth being accepted it is in substance a right to get land at less than its value; and such a right seems to savor of realty rather than of personalty.

5. If the heir does not wish to accept the option but the executor does and the heir will not assign it to him, it is arguable that the executor should be allowed in such a case to have it; but it is difficult to see any principle upon which such a tandem succession could be worked out.

6. There seem to be very few decisions on the subject. In Gustin v. Union School District (1883) 94 Mich. 502 and in *In re* Adams (1883) 27 Ch. Div. 394, the option holder was also the lessee of the land; it held in each case that the option passed to the executor and not to the heir, but the reasoning is far from conclusive. In the first case the court seems to rely partly on the fact that the option accompanied a lease which of course went to the executor, and partly on the argument that the option gave no interest in the land to the option holder. The only case cited for the latter proposition is Richardson v. Hardwick (1882) 106 U. S. 252 which merely held that after the time for the exercise of the option had expired without acceptance, the option holder had no right. In *In re* Adams, *supra*, each of the judges was careful to rest his decision on the peculiar words of the contract which provided for acceptance by the lessee, "his executors, administrators and assignees." While the court is probably right in assuming that the parties may effectually stipulate by their contract that in case of the death of the option holder the option shall be exercised by his executor and not by his heir; yet considering the formal character of the phrase it seems to be a very narrow basis for a decision. In Newton v. Newton (1876) 11 R. I.

contracted to sell,[7] the option to take specific performance with compensation for defects should be treated in the same way as express options.[8]

While specifically enforcible options to sell are rare they are not unknown. If the option holder should die before having exercised the option, it should pass with the land to his heir or devisee.[9]

§ 112. Options—devolution of rights of the other party.

Where the owner of land, subject to an option to buy, dies before the holder of the option has exercised it, it would seem clear that since the owner at the time of his death had no right to the purchase money, no such right can go to his executor; what the owner does have at death is realty which is subject to being changed into personalty by the act of the option holder; this right should therefore pass to the heir. Hence, if the option is exercised after the owner's death, his heir and not his executor should be entitled to the purchase money. Where in a case of a contract for sale and purchase the vendor dies, having lost his right to specific performance by failure to meet a condition precedent and where the purchaser has thereby acquired an option either to rescind or to waive the condition and insist upon specific performance, the above argument has been applied and the vendor's heir given the purchase money.[1] It has also been applied to the case where, after giving an option, a specific devise is made of the

390, 393, the court said that the administrator could not exercise the option except for the heir. See 26 Harv. Law Rev. 747.

7. See *post* § 121. The same reasoning ought to apply to any other fact which makes a contract specifically enforcible by the purchaser but not against him.

8. It is well settled that in such a case the executor can not be compelled to pay the purchase money. Green v. Smith (1738) 1 Atk. 572, 1 Ames Eq. Cas. 193; Broome v. Monck (1805) 10 Ves. 597, 612.

9. Watts v. Kellar (1893) 56 Fed 1.

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1. Thomas v. Howell (1880) L. R. 34 Ch. Div. 166; 1 Ames Eq. Cas. 196.

property, the devisee being given the purchase money upon the option being exercised after the death of the testator.[2]

Where, however, the case has been one of an express option and the question has arisen between the executor on the one hand and the general devisee[3] or heir on the other, the weight of authority is that the purchase money shall go to the executor. In Townley v. Bedwell[4] the decedent had leased certain premises to one Townley for 33 years with a proviso that if Townley, his executor, administrator, or assigns should desire to purchase the premises within six years, he, his executors, etc., should pay to the decedent, his heirs or assigns $600 for the purchase, etc. Before the expiration of the six years, the lessor had died; after his death Townley exercised the option by acceptance. The court (Lord Eldon) held that the rents and profits of the land from the time of the decedent's death till the time of the exercise of the option should go to the decendent's heir but that the purchase money should go to the decendent's executor.

The latter part of the decision seems inconsistent not only with the clear intent of the parties in providing that the purchase money was to be paid to the decedent or his heir or assigns, but also to the former part of the decision giving the rents and profits to the heir till the exercise of the option. Lord Eldon felt bound by an earlier decision[5] which gave the purchase money to

2. Emuss v. Smith (1848) 2 De G. & Sm. 722; *In re* Pyle, 1 Ch. 724.

3. While it is possible to draw a distinction between the case of the special devisee on one hand and the general devisee or heir on the other, on the ground that in the former case the testator has clearly show his intention that the devisee shall have the proceeds, it is not a satisfactory explanation of why the heir or general devisee should not have it.

4. (1808) 14 Ves. 591, 1 Ames Eq. Cas. 199.

5. Lawes v. Bennet (1785) 1 Cox 167 in which the court (Sir Lloyd Kenyon) argued that the acceptance of the option related back to the time of giving the option.

the executor rather than to a general devisee. The fault in Lord Eldon's argument lies in failing to distinguish between right and obligation; the decedent was under an *obligation* to convert the property into money if the option holder so chose; but the decedent had no *right* to do so and hence it is difficult to see how he could pass any to his executor. The doctrine is not only illogical but works badly because the ultimate ownership of the property or its proceeds as between the vendor's heir or executor may remain unsettled for several years and be dependent upon the (to them) accidental decision of a third party.[6] In *Re* Crofton[7] there was a lease for three lives renewable forever, with an option to purchase at any time; the option was exercised within four years after the death of the lessor, but it is conceivable that it might have been exercised many years later.[8]

Where there is a specifically enforcible option to sell and the party against whom it may be exercised dies before it has been exercised, the right to the purchase money,—in case of a later acceptance of the option,—can be enforced only against the decedent's executor because it is an obligation resting primarily upon the personal estate; and the executor upon paying the purchase money should be entitled to keep the land because at the time of death the decedent had no *right* to any land, tho he was under an *obligation*

6. See *ante* § 20. This tends to create a strong temptation for the heir to attempt to bargain with the option holder not to accept the option and for the executor to bargain with him to accept it.

7. (1839) 1 Ir. Eq. 204.

8. For a further criticism of Lawes v. Bennet and Townley v. Bedwell see 27 Harv. Rev. 79, 23 *id.* 70, 12 Col. Law Rev. 155. Much of the confusion has been caused by considering equitable conversion as a reason for a decision rather than a mere name for the result of a decision. It may be suggested that if it is not feasible to get rid of the term, we ought at least to distinguish between entire and partial equitable conversion; entire equitable conversion would exist where the contract is specifically enforcible by both parties; partial equitable conversion when the contract is specifically enforcible only by one.

to take it and pay for it if the option should be accepted.[9]

§ 113. Rights of purchaser's widow or widower.

Where a contract for the sale and purchase of realty is specifically enforcible against the vendor and the purchaser dies, modern statutes give to the widow of the purchaser dower in the premises.[1] The widower is usually held entitled without a statute.[2]

Where the purchase money is still unpaid, she, as well as the heir, can insist that the executor pay for the land out of the personal assets. But if the personal estate is insufficient, she may insist upon dower only by contributing[3] with the heir her proportional share of the unpaid purchase price.[4]

§ 114. Rights of vendor's widow or widower.

Where a contract for the sale and purchase of land is specifically enforcible against the vendor and the vendor dies, the widow or widower are by the common law entitled to dower or curtesy just as if no such con-

9. There seem to be no cases on the point.

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1. Thompson v. Thompson (1854) 1 Jones (N. C.) 430, 1 Ames Eq. Cas. 201; Bailey v. Duncan (1827) 4 Monroe 256, 13 Col. Law Rev. 550.

2. See *post* § 311. The reason for this was that while it had been customary to join husbands in any conveyance of a wife's equitable property interest because of the coverture, it had not been customary to join the wife in the conveyance of property to which the husband had only a claim in equity. Hence while it would not upset land titles to give curtesy to the widower it would do so to give dower to the widow.

3. Hart v. Logan (1872) 49 Mo. 47. In Cahoon v. Cooper, (1869) 63 N. C. 386 it was held that the widow had a right of exoneration as against the heirs also; this is not the better view.

4. Where the holder of an option to buy land dies before exercising it, it is believed to be the better view that the heir is entitled to the land upon paying the purchase price. See *ante* § 111. If the option holder left a widow it would seem that she should be allowed dower in the land upon contributing her share of the price.

tract had been made; but like the heir the widow or widower may be held as constructive trustee of such common law interest for the purchaser.[1] The same reasoning properly applies where the vendor's executor actually enforces specific performance against the purchaser tho it could have been decreed against the heir and widow or widower of the vendor.[2]

Where the purchaser has an option to take specific performance with compensation or sue for damages,—the vendor having so defaulted that he could not have obtained specific performance at the time of his death,—and the purchaser chooses to sue at law for damages rather than for specific performance, the widow or widower (like the heir) of the vendor may keep; because the contract having been extinguished there is no one to hold him or her as constructive trustee. Such choice by the purchaser not only enables the widow or widower of the vendor to retain the common law interest received, but it destroys the inchoate right which the purchaser's wife or husband had in the land.[3]

§ 115. Voluntary and involuntary transfers of vendor's rights.

Where the contract for the sale and purchase of any kind of property is specifically enforcible by both parties, the vendor holds the property as security for the payment of the debt; hence, if he transfers the

1. Dean's Heirs v. Mitchell's Heirs, 4 J. J. Marshall (Ky.) 451, 1 Ames Eq. Cas. 204.

2. For example, where the vendor has been guilty of laches or where there is a large deficiency in the property to be conveyed. See *post* § 121.

3. The purchaser is thus allowed to destroy the equitable property interest without the consent of the wife or husband, whereas the spouse would be compelled to assent and join in an alienation of such interest to another in order to bind the inchoate marital interest therein. This is analogous to the right of the insured in a life insurance policy to destroy the right of the beneficiary by surrendering the policy, though he can not usually substitute a new beneficiary without the consent of the one to be displaced.

debt, which is usually evidenced by a note or bond, the transferee of the debt is entitled to the security.[1] This is merely a special application of the general rule applying to all securities. The basis for the rule is that the transferee is the one best entitled to it; the transferor cannot enforce the security after having transferred the debt and the debtor is not entitled to the security until he pays the debt; hence, a court of equity will declare the transferor of the debt a constructive trustee of the security for the benefit of the transferee.[2]

Wherever the debt is so evidenced by a note or bond that it is by statute made salable at common law execution, it would seem that the same principles should apply to such an involuntary transfer as applies to a voluntary transfer.[3]

On the other hand, a transfer voluntary or involuntary of the property, i. e. the security, will not carry along with it the debt;[4] however, in case of a voluntary transfer, circumstances may show that it was intended that the debt should pass and that a formal assignment was omitted by mistake; in such a case the transferee of the property is entitled to the debt[5] unless of course it has been transferred to a *bona fide* purchaser in which case his equity is cut off.

Where the vendor has wrongfully sold the property to a *bona fide* purchaser, so that the purchaser's equitable property right is thus cut off and destroyed, the purchaser may of course still sue at law for the

1. Graham v. McCampbell (1838) Meigs (Tenn.) 52, 1 Ames Eq. Cas. 205. This is true even though he did not know of the security at the time of the transfer of the debt.

2. This result is usually summed up by saying that the security is incident to the debt. The purchaser may, of course, safely pay to the vendor until the former has notice of the latter's assignment unless the purchaser gave a note or bond for the purchase money. Meyer v. Hinman (1855) 13 N. Y. 180.

3. See *post* § 456.

4. Blackmer v. Phillips (1872) 67 N. C. 340, 1 Ames Eq. Cas. 210.

5. See *post* § 456.

breach of contract. If the purchaser sues for specific performance knowing that his equitable property right has been cut off and that it is now impossible to get such equitable relief, his bill will be dismissed;[6] but if he filed his bill without such knowledge he is properly in an equity court and he will not be compelled to discontinue and sue at law but the equity court will award common law relief. Even if the transfer by the vendor is to one not a *bona fide* purchaser, so that the purchaser's equity is not destroyed, he has his option to affirm the sale and demand the purchase money if he has paid—or the profit if he has not paid.[7]

At common law the land is liable for the debts of the vendor; but since in equity the vendor is merely a fiduciary of the land from the moment of the contract, the purchaser may get an injunction to prevent the creditors of the vendor—since they are not *bona fide* purchasers[8]—from attaching or levying execution on the land.[9]

Where the purchase money note or notes recite that they are given for purchase money, this is notice to any transferee of the notes of the purchaser's equitable claim to get specific performance, so that if good title to the land cannot be made, the transferee cannot enforce the notes.[10]

6. If the vendor sold at a profit and the purchaser in his bill asks either for specific performance or for the amount of such profit in case specific performance can not be had, it would seem that he ought to be entitled to the latter relief even though he knew he could not get specific performance. If the property right were a common law property right the proper remedy would be in quasi contract for the unjust enrichment; but since the property right is exclusively equitable a suit based upon the unjust enrichment arising from a sale of the right would necessarily be in equity, based upon the doctrine of constructive trust.

7. Taylor v. Kelly (1857) 3 Jones Eq. (N. C.) 240, 1 Ames Eq. Cas. 215.

8. Filley & Hopkins v. Duncan (1871) 1 Neb. 134, 137.

9. Hampson v. Edelen (1807) 2 Harris and J. (Md.) 62. The purpose of an injunction here is to prevent a transfer to a *bona fide* purchaser or a clouding of the title.

10. Howard v. Kimball (1871) 65 N. C. 175, 1 Ames Eq. Cas. 242.

§ 116. Voluntary and involuntary transfer of purchaser's right.

As already explained,[1] both the contract right and the equitable property right of the purchaser are freely alienable. If an attempt were made to transfer *inter vivos* the rights to different persons, the equitable property right would probably take precedence over and suspend the enforcement of the contract right, just as in case of the purchaser's death the equitable property right of the heir takes precedence over and suspends the enforcement of the contract right of the executor.

Neither right, however, is subject to common law execution apart from statute. Both rights are intangible and therefore not salable by the sheriff; furthermore the property right, being merely equitable, was not recognized in common law courts. The creditor's remedy is by creditor's bill for equitable execution[2] whereby the creditor—if he can show that he cannot get satisfaction by common law execution—may have the debtor's intangible property, legal or equitable, applied to the payment of his debts. In many jurisdictions statutes have been passed which allow the purchaser's interest to be sold at common law execution by the sheriff.[3]

As already pointed out,[4] the holder of an unexercised option has just as much *right* to the land as he has after he exercises it by acceptance; and if he becomes bankrupt before exercising it the right to the option passes to his assignees in bankruptcy[5] who may either accept it or sell it for the benefit of the creditors. And apart from bankruptcy it ought to be similarly

1. See *ante* §§ 82, 83.
2. See *post* § 455.
3. Block v. Morrison (1892) 112 Mo. 343, 20 S. W. 340, 1 Ames Eq. Cas. 214 note.
4. See *ante* § 111.
5. Buckland v. Papillon (1866) L. R. 1 Eq. 477; Morgan v. Rhodes (1834) 1 M. & K. 435.

subject to being reached by his creditors by a creditor's bill.[6]

§ 117. Liability of vendor or purchaser for waste.[1]

Where, after the making of a contract for the sale and purchase of realty, the vendor, being in possession, commits waste, the purchaser is entitled to the same preventive and compensatory remedies against the vendor as if legal title had already passed;[2] except of course that the purchaser must, in the absence of statute, sue in equity and not at common law because it is an injury to his property right and not to his contract right and the property right is not recognized in a common law court.[3]

Where after the contract is made but before conveyance the purchaser has been placed in possession of the land, his position is analogous to that of a mortgagor in possession; hence, if the purchaser is about to commit such waste as would impair the security of the vendor, the latter may get an injunction.[4] The jurisdiction of equity here is based upon the damages at law being conjectural just as they are where a con-

6. In Provident Co. v. Mills (1899) 91 Fed. 435 the court said that he had no such interest as could be reached by creditors but it was put on the ground that equity would not ordinarily give specific performance to the option holder because of the lack of mutuality of obligation. See *post* § 173.

1. For the general discussion on Waste see *post* §§ 183-190.

2. Clarke v. Ramuz (1891) L. R. 2 Q. B. 456, 1 Ames Eq. Cas. 222. Since this English case was decided after the Judicature Act, the plaintiff's equitable property right was entitled to recognition in all parts of the High Court of Justice.

3. Ordinarily a vendor in possession is not liable to the purchaser for mere permissive waste such as the ordinary wear and decay. Hellreigel v. Manning (1884) 97 N. Y. 56. But if the vendor should fail to relet the premises to tenants pending the settlement of a dispute as to the title, so that the buildings are allowed to go to ruin and the land to go uncultivated, he is accountable for the loss occasioned thereby. Phillips v. Sylvester (1872) L. R. 8 Ch. App. 173.

4. Crockford v. Alexander (1808) 15 Ves. 138, 1 Ames Eq. Cas. 221.

tract is made to give security.[5] After the purchase money has been fully paid of course there is no right to an injunction.

§ 118. Benefit of accruing profit and risk of accidental loss.

Since the purchaser has an equitable property right from the moment of making a contract which is specifically enforcible against the vendor,[1] he is in a position to avail himself of any increase in the value of the property by enforcing specific performance.[2]

Where the contract is specifically enforcible against the purchaser[3] and the property has depreciated in value because of some accidental[4] loss, upon which party—in absence of express stipulation—shall the loss fall? There are at least five conceivable answers to this question.

(1) Equity might have held that the risk should remain upon the vendor until the conveyance of the legal title, so that if the depreciation were small the purchaser could be forced to perform but would be

5. See *ante* § 51.

1. See *ante* § 83. Whether or not it is specifically enforcible by the purchaser against the vendor is here of no importance.

2. Hence one who has a specifically enforcible contract for shares of stock is entitled to dividends declared upon the stock after the making of the contract but before transfer. Black v. Homersham. (1878) L. R. 4 Exch. D. 24, 1 Ames Eq. Cas. 239. Conceivably dividends might have been treated like rents and profits of land instead as increase in value.

3. If, for any reason, the contract is not specifically enforcible against the purchaser the loss must of course be borne by the vendor. Thompson v. Gould (1838) 20 Pick 134; 1 Ames Eq. Cas. 234; Gorsch v. Niagara Fire Ins. Co. (1910) 123 N. Y. Sup., 877. The criticism of the case in 10 Col. Law Rev. 673 seems unsound. Whether or not it is specifically enforcible by the purchaser against the vendor is here of no importance.

4. That is, loss for which neither the purchaser nor the vendor is in any way to blame. Where the one in possession is responsible for a loss it is waste. See *ante* § 117.

entitled to compensation[5] therefor, and if large the purchaser could not be compelled to perform but might elect[6] to insist upon specific performance with compensation. This is apparently the rule in a minority[7] of jurisdictions in this country and has the merit of coinciding with the present rule at common law.[8] Very little can be urged against such a view; for while it was necessary for the purchaser's adequate protection[9] to give him an equitable property right from the moment he had a specifically enforcible contract, it is not necessary for the vendor's protection that he be able to throw the risk of loss upon the purchaser from the moment he has a contract specifically enforcible against the latter, because the vendor protects himself against most of such losses by insurance and usually does have insurance at the time of making the contract and expects to continue it till conveyance.

(2) Equity might have held that the risk should pass to the purchaser on the day fixed for performance if on that day the vendor is able to perform; Professor Langdell argued strongly for this view.[10]

(3) The risk might have been held to pass to the purchaser at the moment the vendor puts him in default by a proper offer of performance.[11] This would

5. Just as in cases where there was at the time of contract a slight deficiency in the *res;* see *post* § 121.

6. See *post* § 122.

7. Gold v. Murch (1879) 70 Me. 288; Wells v. Calnan (1871) 107 Mass. 514.

8. See 12 Col. Law Rev. 257 arguing that the rule should be the same in equity as at law.

9. See *ante* § 83.

10. 1 Harv. Law Rev. 374, 375: "The reason for this is that when performance of a contract is enforced by equity, the performance is held to relate back to the time fixed by the contract for its performance." Professor Langdell did not in this article say what he would do in the case where no time was set for performance.

11. In determining some other questions the time of putting the purchaser in default has been held the decisive factor. In Carrodus v. Sharp (1855) 20 Beav. 56, where the subject matter of sale was the lease of a mill which bound the lessee to keep in repair, it was held

have the advantage over Professor Langdell's view in that it could be applied to cases where no time was set for performance.

(4) Equity might have held that the risk passed to the purchaser from the moment when he is put into possession. This is the view urged by Professor Williston.[12]

(5) The rule in England[13] and the prevailing rule in this country[14] throws the risk upon the purchaser from the moment the contract is made. As already pointed out *supra* this was not a necessary rule but it was a natural rule when we consider the strong inclination of courts to make similar the rules applying to vendor and purchaser.[15] It is of course open to the

that the burden of complying with the covenant to repair did not pass till the vendor made out a good title. And in Ligget v. Metropolitan Ry. Co. (1870) L. R. 5 Ch. App. 716 the court held that although ordinarily the purchaser was entitled to the rents and profits from the time set for performance yet if he defaulted in the payment of the purchase money he was not so entitled.

12. See 9 Harv. Law Rev. 111-125. The arguments are briefly as follows: (1) That it is better to allow the loss to lie where it fall [at law?], because it saves litigation. (2) It is wiser to have the party in possession of property care for it at his own peril rather than at the peril of another. (3) The purchaser is not likely to insure before taking possession. In answer to (3) it may be suggested that if the purchaser does not provide for insurance before taking possession he is not likely to do so at that time or until he gets title. Professor Williston's suggested rule has the merit of being analogous to the rule regarding the risk of loss in conditional sales of chattels.

13. The leading case is Paine v. Meller (1801) 6 Ves. 349, 1 Ames Eq. Cas. 227, though it has also been cited by Professor Langdell in support of his contention. 1 Harv. Law Rev. 375 note 1. See also White v. Nutt (1702) 1 Peere Wms. 61, 1 Ames Eq. Cas. 226 where a purchaser of a lease for two lives was forced to pay the full purchase price though one of the lives had ceased before the time set for conveyance.

14. See Osborn v. Nicholson (1871) 13 Wall 654, 660; Blew v. McClelland (1860) 29 Mo. 304, 306, 9 Harv. Law Rev. 112 note 3; 2 Ill. Law Rev. 274. See Professor Keener's article in 1 Col. Law Rev. 1-10 in favor of the rule; also 23 Harv. Law Rev. 476.

15. That is to say, since the purchaser is given an equitable property right from the moment of contract it is only fair that

parties to stipulate that the risk is to remain on the vendor until a later time and an express promise on the part of the vendor to deliver over the premises in the same condition as they are at the making of the contract amounts to a stipulation that the risk remains on the vendor till conveyance of the legal title.[16]

§ 119. Risk of loss—criticism of the prevailing rule.

The rule of Paine v. Meller has been vigorously assailed,[1] and it must be admitted that the minority view is to be preferred as coinciding more nearly with the usual intention and understanding of the parties. On the other hand, the prevailing rule or any other of the rules which have been suggested[2] could be made to operate quite satisfactorily if there were adequate means of giving information of the rule to purchasers so that they could protect themselves,[3] or if insurance companies could be induced to provide in their policies that a purchaser would be entitled to the insurance money in case of loss[4] before conveyance of the legal

from the same moment he should bear the risk of loss. Or to put it a little differently, the conversion should operate completely on both sides.

16. Cook v. Fisher (1813) 3 Bibb. (Ky.) 51; Goldman v. Rosenberg (1889) 116 N. Y. 78, 22 N. E. 259. But merely an express promise to give possession at a future date is ineffectual. Brewer v. Herbert (1869) 30 Md. 301.

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1. See 9 Harv. Law Rev. 117-125; 12 Col. Law Rev. 237; 13 *id.* 386.

2. With the exception of Professor Langdell's suggested rule which apparently makes no provision for cases where no time is set for performance.

3. By the rules of most fire insurance companies at the present time the purchaser can usually entitle himself to the protection of the vendor's insurance by notifying the company of the contract—unless the purchaser is a person who is objectionable because of the moral hazard.

4. The objection to such a provision is of course that the insurance company should have a chance to choose whom they will insure, because of the moral hazard sometimes involved. Where,

title.[5] In the absence of any such provision or any arrangement between the insurance company and the purchaser, the latter is not entitled to any of the insurance money[6] because the contract of insurance is one of personal indemnity[7] and protects only the vendor.[8] Similarly one who after a loss by fire exercises an option by acceptance cannot successfully claim the insurance money already collected from the insurance company.[9]

however, the premises remain in the possession of the vendor the moral hazard of the purchaser becomes of slight importance; and the provision might be limited—where the purchaser is put into the possession—to purchasers who had never been refused insurance because of the moral hazard.

5. Of course the objection to the prevailing rule still remains where the vendor has no insurance on his buildings or where the loss is due to a cause which is not insured against. In Cass v. Ruddle (1692) 2 Vernon 280 the loss was due to an earthquate, which is a casualty not ordinarily insured against.

6. Rayner v. Preston (1881) L. R. 18, Ch. D. 1, 1 Ames Eq. Cas. 229.

7. The vendor is entitled to a decree for the full amount of the purchase price and if he receives it he can collect nothing from the insurance company; and if he has already collected it he must make restitution to the company. Castellain v. Preston (1883), L. R. 11, Q. B. D. 380. If the purchaser is financially irresponsible the insurance company will of course be liable to the vendor. If the purchaser is solvent but the vendor prefers to collect from the insurance company the latter can probably insist upon being subrogated to the vendor's claim against the purchaser to specific performance, which would result in compelling the vendor to convey.

8. Under the modern "change of interest" clause in fire insurance policies the entering into a contract which is specifically enforcible against the purchaser is held to avoid the policy unless notice thereof is given to the company; if notice is given the policy then protects the vendor's interest in the purchase money. Were it not for this clause a purchaser might conceivably be held entitled to the insurance money where he has paid the vendor in full so that the latter has become practically a trustee of the land with no substantial interest left to protect. See Gorsch v. Niagara Ins. Co. (1910) 123 N. Y. Supp. 877.

9. Edwards v. West (1876) 7 Ch. Div. 858.

F. PARTIAL PERFORMANCE WITH COMPENSATION.

§ 120. Effect of breach by plaintiff in action at law.

Roughly speaking there have been three stages[1] in the development of the common law rule as to the effect of a breach by the plaintiff in an action for breach of contract. When bilateral contracts were first recognized, each promise was considered to be entirely independent of the other promise unless there was a condition, either express or implied in fact. That is, the mere fact that the plaintiff had broken his own promise even by utter failure to perform, was no bar to his recovery against the defendant for a breach of the latter's part of the contract; the defendant's sole remedy was to sue the plaintiff in another action. By a process of interpretation of the parties' intentions which frequently amounted to a determination of what the parties would probably have provided for if the point had been brought to their attention at the time of making the contract—the courts imposed upon one or both parties a condition either that he must perform or offer to perform his own promise before being able to sue the other party for a breach. Logically this should have been regarded as an excuse rather than as a condition; but since the early law gave no excuse, the courts would have found it difficult to overrule the old cases. By reading in implied conditions they accomplished the same result indirectly. Where the performance by one party took some time—such as the rendering of personal service—while the performance by the other party required only a slight fraction of time—such as the payment of money, the common law imposed a condition that the former could not sue for the price of his performance till he had performed; such conditions are called conditions precedent implied in law. Where the performance by each party may be

1. See an article by Professor Costigan on Conditions in Contracts in 7 Col. Law Rev. 151. See also 24 Harv. Law Rev. 424.

performed in a fraction of time—for example, the conveyance of property on the one hand and the payment of money on the other,—the common law imposed conditions upon both parties that if either failed to tender performance he would be unable to recover from the other. Such conditions, requiring only tender of performance, are called mutual concurrent conditions implied in law. During the second stage the requirement of performance or of tender was strictly enforced; the slightest breach, especially if *in limine,* was fatal. The third stage, which was brought about largely thro the influence of equitable principles upon the common law courts, was a modification of the strict requirement of performance; it is now insisted only that the performance or tender shall be substantially complete; or to state it in a different form, merely a slight breach by the plaintiff will be no bar to his recovery. Whether there has been substantial performance in the particular case will depend upon all the circumstances of the case, including especially the nature of the subject matter and the time of breach—whether *in limine* or after part performance.[2]

Perhaps it should be pointed out here that in this last stage of the common law it is not open to the criticism that it involves a making over of the contract by the court, because the common law started with the proposition that no breach by a plaintiff was a bar and the defendant cannot complain because now the law requires only substantial and not full performance.

§ 121. Effect of breach by vendor upon his suit for specific performance.

The question whether a vendor whose tendered performance lacked in quantity or quality what the

2. The courts are more liberal to a plaintiff after he has partly performed because the denal of relief is more likely to result in a hardship to the plaintiff than where the breach is *in limine.*

contract called for was entitled to compel the purchaser to accept what he could convey with compensation for the deficiency arose apparently at the time when the common law had not developed beyond the second stage. The question arose, too, at a time when English chancellors felt called upon to exercise a more paternalistic jurisdiction than equity courts now exercise. The result was that vendors were allowed specific performance in cases where not only could there have been no recovery at law, but where specific performance amounted to making a new contract for the parties which probably never would have been made at all if they had known the facts. In Dyer v. Hargrave,[1] the premises in question were sold at auction, the house described by the auctioneer as being in good repair and the farm as consisting of fifty acres, part arable and part marsh, in a high state of cultivation and all within a ring fence. The defense set up was that the house was in bad repair and the ground in a poor state of cultivation and that it was not enclosed within a ring fence but that it was interspersed with other land. The court compelled the purchaser to take the land and pay the purchase price with compensation only for the defects in the soil and house; since the purchaser had lived in the neighborhood the lack of a ring fence was considered so obvious that the purchaser could not have believed the statement that there was one; therefore he was allowed no compensation for it.

It is at least doubtful whether a court of equity would give specific performance in such a case at the

1. (1805) 10 Ves. 505, 1 Ames Eq. Cas. 245. See also Howland v. Norris (1784) 1 Cox Ch. 58 where the purchaser was compelled to accept an estate subject to a tithe instead of being tithe free; King v. Bardshaw (1822) 6 Johnson Ch. 38, building spot two feet narrower than represented. The most extreme case is that related by Lord Eldon in Drewe v. Hanson (1802) 6 Ves. 675; the contract was for a house and a wharf, the object of the purchaser being to carry on his business at the wharf; the purchaser was compelled to take the house alone.

present time.[2] Now that the common law rule is more liberal toward a plaintiff than formerly, and there is a tendency on the part of equity courts to restrict the doctrine of partial performance with compensation, the position of each of the two courts is approaching that of the other and it is to be hoped that they will ultimately be the same. At the present time, however, though the term substantial performance is used in both common law and equity cases, it is likely that it would be administered more liberally to the vendor by an equity court than by a common law court.

Where the deficiency in the plaintiff's performance takes the form of an incumbrance on the *res*, the breach is purely formal if the incumbrance is due and may be paid off out of the purchase money;[3] but if it is not due and the incumbrancer is unwilling to receive the money and remove the incumbrance, this may constitute such a defect as will prevent specific performance,[4] especially if the amount of the incumbrance is relatively large. Where, however, the purchaser bought in an outstanding tax title and set it up in defense to a suit for specific performance it was held that he could not thus take advantage of such sharp practice.[5]

§ 122. Suit by purchaser for specific performance with compensation.

Where a vendor is unable to render complete per-

2. The vendor failed in the following cases: Roffey v. Shalleress (1819) 4 Madd. 227, one seventh of the estate instead of two sevenths bargained for; Drewe v. Corp (1804) 9 Ves. 368, leasehold instead of freehold; Peers v. Lambert (1844) 7 Beav. 546, title failed as to a jetty which was essential to the enjoyment of the property; Perkins v. Ede (1852) 16 Beav. 193, 1 Ames Eq. Cas. 247, title failed as to a long strip of land between the house and the road.

3. See Halsey v. Grant (1806) 13 Ves. 73.

4. O'Kane v. Kiser (1865) 25 Ind. 168; Hinckley v. Smith (1872) 51 N. Y. 21.

5. Curran v. Banks (1900) 123 Mich 594, 82 N. W. 247, 14 Harv. Law Rev. 158

formance according to the contract, it may be that the purchaser will prefer to take what the vendor can convey to him with compensation for the deficiency rather than to sue at common law for damages. In many cases the purchaser has been given such relief and the doctrine is not limited to cases where the vendor can give substantial performance.[1] In fact there are decisions giving specific performance with compensation when the vendor had only a life estate[2] in the property and also where he had only one-fifth[3] of the property he had contracted to convey.

In so far as the purchaser is given specific performance with compensation for more than slight defects, it is difficult to find a satisfactory basis for the doctrine. It is usually said[4] that the vendor is estopped to set up that he can not fully comply with the contract. If it be urged against this explanation that the application of the genuine doctrine of estoppel places the party in whose favor it operates in the same position as he would have been if the representation made by the other party had been true, it may be answered that although equity cannot do this for the purchaser, it does so as nearly as it can and it is not for the vendor to complain that equity can do no more for the purchaser. However, it may be further urged against the estoppel

1. The purchaser may therefore be in a position where he can enforce specific performance with compensation but where the vendor could not enforce specific performance against him.

2. Cleaton v. Gower (1674) Finch 164, 1 Ames Eq. Cas. 248.

3. Bogan v. Daughdrill (1874) 51 Ala. 312, 1 Ames Eq. Cas. 251 note. Some other cases allowing recovery by the purchaser are Hill v. Buckley (1811) 17 Ves. 394, (a deficiency of 26 acres out of 217); Royal Bristol Bldg. Soc'y v. Bomash (1887) 35 Ch. D. 390, (compensation allowed for not getting possession at once); Jones v. Evans (1848) 17 Law J. Ch. 409, (vendor has only 2/21 of the property instead of ⅓ of the property). On the other hand, in Wheatly v. Slade (1830) 4 Sim. 126, specific performance with compensation was denied against the vendor who could convey only 9/16. See also 8 Col. Law Rev. 309.

4. See Barnes v. Wood (1869) L. R. 8 Eq. 424, 1 Ames Eq. Cas. 249.

explanation that relief has sometimes been given where there was no misrepresentation by the vendor.[5]

Where the purchaser knew of the deficiency at the time of the contract, he can not get compensation therefor[6] unless the vendor agreed to remove the defect.[7]

§ 123. Same—criticism of the doctrine.

Even assuming that the basis of the doctrine is estoppel, this does not meet the objection that except in cases of slight deficiencies equity is violating—often seriously—the freedom of contract by enforcing specifically a contract which the parties never made;[1] e. g., in the cases above mentioned, where in one case the vendor had a life estate and in the other only one-fifth of the *res* and where he would receive only a fraction of the purchase money, can not the vendor very well say that he would not have made that sort of contract at all? The only justification in remaking the contract is that usually there would be much greater hardship[2] on the purchaser if he is left to his remedy at law

5. See 8 Col. Law Rev. 310; in Bass & Carter v. Gilliland (1843) 5 Ala. 761, the vendor had after the contract with the purchaser, conveyed ⅔ of the property to a third party; it was held that the purchaser could elect to take the remaining third. See also Brown v. Ward (1899) 110 Ia. 123, 81 N. W. 247.

6. Joyner v. Crisp (1912) 158 N. C. 199, 73 S. E. 1004; Castle v. Wilkinson (1870) L. R. 3 Ch. App. 534, 1 Ames Eq. Cas. 252.

7. See Wilson v. Williams (1857) 3 Jur. N. S. 810.

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1. It is sometimes said that if the vendor intended to sell all, he intended to sell any part which he should happen to have, but this is not necessarily true. It may be that the vendor needed to raise a particular sum of money and a less sum is of no advantage to him. It would seem that whether the vendor did intend to sell whatever he had should be taken into consideration in each case by the court in exercising its discretion. See 8 Col. Law Rev. 309.

2. This is especially true in jurisdiction where in an action at law the purchaser is not allowed damages for the loss of his bargain but merely for the expenses incurred. Bain v. Fothergill

than there is on the vendor in compelling him to convey what he has; but if in the particular case the balance of hardship is the other way it would seem that compensation should be refused.

§ 124. Limitation of the doctrine.

Where the defect is of such a nature that the amount of compensation for it can not be accurately estimated, as e. g. a dower interest, the better view is that compensation should be refused;[1] if the purchaser is not willing to pay the full purchase price for what the vendor is able to convey, he should be left to his common law remedy of damages. In some jurisdictions, however, compensation is given by present abatement figured accordingly to the mortality tables.[2] In others the purchaser is protected by being allowed to retain or have

(1874) L. R. 7 H. L. 158. 25 Harv. Law Rev. 731. See also 3 Sedgwick, Damages, 9th ed. §§ 1009-1011.

1. Riesz's Appeal (1873) 73 Pa. 485, 1 Ames Eq. Cas. 254. Ebert v. Arends (1901) 190 Ill. 221. Apparently the early English practice was to compel the husband to coerce the wife into releasing her dower right; Hall v. Hardy (1733) 3 Peere Wms. 187. But this is no longer followed in England. Martin v. Mitchell (1820) 2 Jac. & W 413. See 10 Col. Law Rev. 573, 28 Harv. Law Rev. 732.

2. This is computed by determining the present value of an annuity for the life of the wife equivalent to the interest in the proportion—usually one third—to which her contingent right of dower attaches and deducting therefrom the value of a similar annuity for the joint lives of herself and her husband. See Jackson v. Edwards (1839) 7 Paige (N. Y.) 386, 408. For a criticism of this see Sternberger v. McGovern (1874) 56 N. Y. 12, 19,: "To require the defendant to convey. . . . and pay such compensation as the court should determine its market value was impaired by the outstanding right of dower, or such sum as the real value of such right ascertained by the tables of mortality would be unjust and oppressive. . . . These tables when applied to a great number of cases will, in the aggregate, show correct results: hence they may be used by life insurance companies with safety in fixing their rates and are resorted to by

set aside enough of the purchase money for an indemnity.[3] There is another objection in a few jurisdictions to giving compensation in the dower cases, viz., that at common law the vendor is not liable for the loss of the bargain and hence to give specific performance with compensation would be placing heavy pressure[4] on the wife to get her to join with her husband and release her dower right.[5]

Another case where compensation would be refused because difficult to estimate is that where land is subject to restrictive covenants.[6]

courts when the probable duration of life must be determined in adjusting the right of the parties. But to determine the value of the inchoate right of dower in this way for the purpose of enforcing specific performance. . . . with compensation, would be unsustained by precedents or sound principle." Cf *ante* §§ 49-53. where specific performanct is *given* because damages are conjectural.

3. Wannamaker v. Brown (1907) 77 S. C. 64, 57 S. E. 665, 25 Harv. Law. Rev. 732.

4. If the property involved is a homestead no decree whatever will be given against the husband because a deed by the husband alone is wholly invalid and equity will not give a futile decree. See Phillips v. Stauch (1870) 20 Mich. 369.

5. See 3 Sedgwick, Damages, 9th Ed. § 1009-1011. See also Young v. Paul (1855) 2 Stockton (N. J.) 401 where the court thought that a decree of specific performance with compensation would be no greater compulsion than a judgment at law for damages. Where there will be no coercion on the wife that objection to giving compensation fails, though of course the objection as to the conjectural value of the defect still applies. In Williams v. Wessels (1915) 94 Kan. 71, 145 Pac. 856 the vendor made a contract to convey to the plaintiff in which the wife did not join. The wife later joined with him in the conveyance to the defendant who had notice of the plaintiff's contract. The defendant was given his option of conveying the whole or of conveying such interest as the plaintiff could have obtained from the vendor, with abatement of the purchase price. Since it was within the power of the defendant to convey the whole even the objection as to the conjectural value of the dower right which he may retain has little weight. See 28 Harv. Law Rev. 717.

6. Rudd v. Lascelles (1900) 1 Ch. 815, 1 Ames Eq. Cas. 256. Lesley v. Morris (1873) 9 Phila. 110.

G. Defenses.

I. Lack or inadequacy of consideration.

§ 125. Consideration in uses and trusts.[1]

Before the Statute of Uses, it was impossible to raise or create a use in land gratuitously, i. e., unless the land were conveyed upon a use or unless consideration were paid to the owner of the land for a use. After the Statute of Uses when uses were important only in the law of conveyancing, the rule was relaxed so that the owner of land might gratuitously create a use therein for the benefit of a relative by blood or marriage; the use being created, the Statute of Uses at once passed the legal title. This conveyance was called a covenant to stand seized.

Down to the decision in *Ex parte* Pye,[2] the law of trusts was like the old law of uses; in that case, however, it was decided that a declaration of trust in favor of another was not rendered invalid merely because it was gratuitous. Outside of these cases in the law of uses and trusts, the genuine volunteer—one who pays nothing in any way for what he receives[3]—is denied equitable relief.

§ 126. Consideration necessary in specific performance.

At common law before, as well as after, the doctrine of consideration arose, promises under seal were binding though the promisee was a volunteer; a covenant to convey land, therefore, was enforcible at common law by an action for damages though there was no consideration for the making of the covenant

1. See *post* §§ 266, 267, for a fuller discussion; See also 21 Harv. Law Rev. 261-274, Origin of Uses and Trusts by Professor James Barr Ames.

2. (1809) 18 Ves. 140; see 9 Harv. Law Rev. 213.

3. A donee of land who merely goes into possession without making improvements is not entitled to specific performance; see *post* § 138. As to reformation between volunteers, see *post* §§ 343, 344.

or for the conveyance.[1] But equity refuses in such a case to decree specific performance,[2] though, as we have just seen, a declaration of trust for the land would have been enforced.

In Ferry v. Stephens,[3] the vendor contracted to sell certain land to the plaintiff for $1100 with the understanding that the purchase money was not to be paid and a receipt in full for the purchase price was indorsed upon the contract by the vendor. The vendor died, having devised the premises. It was held that since the written receipt was conclusive the agreement was not voluntary and hence that the plaintiff could get specific performance without paying anything. In jurisdictions which allow a receipt to be contradicted,[4] the plaintiff would not have been able to get specific performance without paying.

§ 127. Same—options—meritorious consideration.

It seems to be well settled that an option to buy land is specifically enforcible although the validity and irrevocability of the option depends upon a seal alone without consideration.[1] The reason for this is

1. See 9 Harv. Law Rev. 49-59, Specialty Contracts and Equitable Defenses, by Professor Ames.

2. Jefferys v. Jefferys (1841) Craig & Phillips 139, 1 Ames Eq. Cas. 261; Tomlinson v. York (1858) 20 Texas 694. The burden of alleging and proving that there was consideration for a sealed contract should be upon a plaintiff who seeks specific performance. But courts are so accustomed to repeat the now discredited explanation of the validity of sealed instruments, that a seal imports consideration, that they are likely to throw the burden on the defendant to show that there was no consideration. Borel v. Mead (1884) 3 N. Mex. 84, 2 Pac. 222, 1 Ames Eq. Cas. 434. See Mills v. Larrance (1900) 186 Ill. 635, 58 N. E. 219, 14 Harv. Law. Rev. 387.

3. (1876) 66 N. Y. 321, 1 Ames Eq. Cas. 262.

4. See Wigmore, Evidence §§ 2532, 2518.

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1. Mansfield v. Hodgden (1888) 147 Mass. 304, 17 N. E. 544; O'Brien v. Boland (1896) 166, Mass. 481, 44 N. E. 602, 1 Ames Eq. Cas. 433.

that although the plaintiff is a volunteer so far as the option itself is concerned he must pay the purchase price in order to get the land and therefore in substance is not a volunteer.

In the United States where it is not customary to provide for one's wife and children by marriage settlements the anomalous doctrine has grown up of considering agreements to make provision for members of one's immediate family as being founded upon a meritorious consideration.[2]

§ 128. Adequacy of consideration.

Although equity will not give specific performance of gratuitous covenants, no greater amount of consideration is required than is required by common law courts; in other words, the inadequacy of the consideration is of itself no defense to specific performance of the contract.[1] Where, however, it is so great as to shock the conscience of the chancellor and thus show fraud,[2] or when it is coupled with insufficient evidence of fraud,[3] or unfair conduct, or coercion,[4] relief may be denied.

It is usually the seller who sets up inadequacy of consideration as a defense to a suit for specific performance but occasionally it is the buyer. In Espert v. Wilson,[5] the defendant thinking he could sell a lot

2. See *post* § 267. In Buford's Heirs v. McKee (1833) 31 Ky. 107 the court refused to extend the doctrine so as to include a nephew.

1. Burrowes v. Lock (1805) 10 Ves. 470, 1 Ames Eq. Cas. 263. Abbot v. Sunder (1852) 4 De G. & S. 448. See 15 Harv. Law Rev. 741.

2. Lord Eldon in Coles v. Trecothick (1804) 9 Ves. 234, 246; 5 Ill. Law Rev. 219 note; 27 Harv. Law Rev. 288.

3. See Woolums v. Horsley (1892) 93 Ky. 582, 20 S. W. 781. Seymour v. Delaney (1824) 3 Cowen 445.

4. Browne v. Coppinger (1854) 4 Ir. Ch. 72 (plaintiff who was in possession as lessee threatened to take exhaustive crops off the land if the lessor would not give him a lease on the lessee's own terms).

5. (1901) 190 Ill. 629, 60 N. E. 923.

of land to X provided he could convey with it an adjoining strip, contracted to buy the strip from the plaintiff who demanded an excessive price, knowing why the defendant wanted it. The defendant then failed to sell to X and contested the plaintiff's suit for specific performance; because of the excessive price specific performance was refused.

II. Title not marketable.

§ 129. Development of the doctrine requiring marketable title.

The older rule required that the vendor should furnish a good title; the fact that there was some doubt of its being good due to the uncertainty of either the law or the facts was no defense provided the Chancellor himself was convinced that the title was good.[1] The modern view,[2] however, is that a doubtful title should not be forced upon the purchaser unless the court's decree will cure the defect in it and thus preserve to the purchaser the right and power to alien the property—in which event the title ceases to be doubtful. It is only a comparatively rare case where a court is able to do this; the land must not be outside the jurisdiction, the parties whose claims are involved must be parties to the suit[3] and the court must be the final court of appeal. Where a court can not thus settle the matter finally it should

1. In Stapylton v. Scott (1809) 16 Ves. 272, 1 Ames Eq. Cas. 266, Lord Eldon said, "The habit of this court formerly was not to refuse the decree of specific performance upon the ground that the title was doubtful. The court, relying on its own opinion in favor of the title would not admit any doubt detracting from the value of that opinion."

2. See the cases collected in 1 Ames Eq. Cas. 267 note; 22 Harv. Rev. 529.

3. See Fleming v. Burnham (1885) 100 N. Y. 1, 2 N. E. 905; Abbot v. James (1889) 111 N. Y. 673, 19 N. E. 434; Hunting v. Damon (1894) 160 Mass. 441, 35 N. E. 1064.

take into consideration the reasonable doubt of other persons[4] regarding the title; and if the court decides that the purchaser would have difficulty in marketing the property because of the doubtful title, specific performance[5] should be refused. Whether the court should take into consideration the improbability of an actual defect being litigated seems to be unsettled;[6] as is also the question whether the presumption of death arising from absence for over seven years is sufficient to make the title marketable where the death is an essential fact.[7] It is no objection that the vendor's title was acquired by adverse possession because the title has become an accomplished fact and does not rest upon mere presumption arising from the passing of time.[8]

4. Pyrke v. Waddingham (1850) 10 Hare 1, 1 Ames Eq. Cas. 269. The construction of written instruments frequently raises doubtful questions of title. A will making a devise to a widow was passed upon in Giles v. Little (1881) 104 U. S. 291, Little v. Giles (1889) 25 Neb. 313, 41 N. W. 186, Roberts v. Lewis (1893) 153 U. S. 367. The first decision gave the widow only a life estate, the second gave her a fee simple with condition subsequent as to a later marriage and the third a life estate with power to dispose of the fee during widowhood.

5. Apparently law courts have now adopted the equity rule; 22 Harv. Law Rev. 529. Moore v. Williams (1889) 115 N. Y. 586, 22 N. E. 233.

6. In Empire Realty Co. v. Sayre (1905) 107 N. Y. App. Div. 415 the ornamental stone work of the ten story building contracted for projected two inches over the street line. The title was held marketable because of the improbability of the city's litigating the matter. For a criticism see 6 Col. Law Rev. 56.

7. The better view is that it is not in itself sufficient but it may be enough if corroborated by other facts, such as illness, exposure to danger or advanced age. See Cerf v. Diener (1914) 210 N. Y. 156, 104 N. E. 126, 14 Col. Law Rev. 460, 27 Harv. Law Rev. 768, 21 *Id.* 374, 19 Green Bag 713. On the other hand, the possibility that a widow seventy years of age might have children was considered too remote to prevent specific performance, in spite of the well settled rule in property law, in regard to possibility of issue. See 27 Harv. Law Rev. 286.

8. Tewkesbury v. Howard (1893) 138 Ind. 103, 37 N. E. 355, See Moore v. Williams (1889) 115 N. Y. 586, 22 N. E. 233.

III. Statute of Frauds—part performance—fraud.

§ 130. Statute of Frauds.

The fourth section of the English Statute of Frauds[1] has been copied either verbatim or substantially in nearly all American jurisdictions. It reads as follows: "No action shall be brought——(3) to charge any person upon any agreement made in consideration of marriage; (4) or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; (5) or upon any agreement that is not to be performed within the space of one year from the making thereof; (6) unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Although the wording of the statute is similar to that of the Statute of Limitations, viz., "no action shall be brought," it has always been held to apply to equity suits as well as to actions at common law. As already pointed out,[2] statutes of limitations are construed as not applying to equity suits unless specifically so provided.

The phrase "contract or sale" seems now quite awkward; the modern phrasing would be "contract for the sale of." However, the awkward phrasing may have helped bring about a broad interpretation of the statute so far as the kind of transaction was concerned; for the statute has been held to apply to a contract to devise,[3] to a contract to exchange[4] and would probably be applied to any contract to acquire an interest in land in any way whatsoever.[5]

1. Stat. 29 Chas II. Chap. III, Sec. 4, 8 Statutes at Large 405.
2. See *ante* § 31.
3. Harder v. Harder (1844) 2 Sandf. Ch. (N. Y.) 17.
4. Smith v. Hatch (1865) 46 N. H. 146, 1 Ames Eq. Cas. 277.
5. As applying to oral contracts to make mutual wills, see Hale v. Hale (1894) 90 Va. 728, 19 S. E. 739, 25 Harv. Law Rev. 571;

There are two exceptions to the application of the Statute of Frauds by courts of equity, the limits of which will be discussed in the following sections.

§ 131. Payment of purchase money.

The seventeenth section of the English Statute of Frauds relating to the sale of chattels expressly provided that a memorandum should not be required where there had been earnest or part payment of the purchase money or a delivery of the chattel.[1] Tho the fourth paragraph under discussion makes no such exception, courts of equity at first apparently refused to enforce the statute where there had been a part performance on either side. Hence, payment or part payment of the purchase money seems to have been sufficient to take a case out of the statute.[2] Whatever may have been the law at that time, however, it is now settled in most jurisdictions that except where the purchase price takes the form of personal services, the full or part payment thereof does not prevent the operation of the statute. In Lord Pengall v. Ross,[3] where there was an oral agreement to make a lease for twenty-one years and the lessee had paid $100 in part payment the statute was held applicable and specific performance refused. So, where the oral contract was for an exchange of land and the plaintiff has conveyed his land to the defendant, the court refused to compel the defendant to convey his land to the plaintiff.[4] In Montacute v. Maxwell[5] the defendant orally agreed with the plaintiff that if the plaintiff

14 Col. Law Rev. 272. And see Montacute v. Maxwell (1720) 1 Peere Williams 618, 1 Ames Eq. Cas. 274 where the agreement was that the plaintiff should, after her marriage, enjoy her property as if sole.

1. 29 Car. II c. 3, § 17; Williston, Sales, § 51.
2. Lacon v. Mertius (1743) 3 Atk 1; 4 Col. Law Rev. 294.
3. (1709) 2 Eq. Abridgt, 46, pl. 12, 1 Ames Eq. Cas. 276.
4. Smith v. Hatch (1865) 46 N. H. 146, 1 Ames Eq. Cas 277.
5. (1720) 1 Peere Williams 618, 1 Ames Eq. Cas. 274.

would marry him she should enjoy her property to her separate use as if sole; after marriage the defendant refusing to allow her to do this, the plaintiff asked for specific performance but it was refused, though the plaintiff had fully performed on her part. It is to be observed in this case that the contract came within two provisions of paragraph four; the one relating to interests in land and the other relating to agreements in consideration of marriage. Hence even if the court had held that performance took the case out of the provision of the statute as to interests in land,[6] it would be difficult to see how any court could logically allow marriage to prevent the operation of the other provision. Such a holding would render the provision nugatory in equity, for until marriage the plaintiff could not ask for specific performance and if marriage took the case out of the statute, there would be no cases to which the provision could apply because a court of equity would not compel marriage.

§ 132. Taking possession by vendee or lessee.

Payment in full or in part is now usually held insufficient to take the contract out of the operation of the statute; but in the majority of jurisdictions the mere taking possession under the contract by the vendee or lessee is sufficient without more to exempt from the requirement of a memorandum.[1] And the rule operates not only in favor of the purchaser or lessee

6. There is at least one case so holding. In Nowack v. Berger (1896) 133 Mo. 24, 34 S. W. 489, the defendant had made an oral ante-nuptial agreement with his intended wife that, in consideration of their marriage and of his having charge of her infant son, the plaintiff, during his minority, he would in his will devise to this son and any children of this marriage in equal shares. The marriage was held to be sufficient part performance to render the contract enforcible in equity. See 10 Harv. Law Rev. 60.

1. Butcher v. Stapley (1685) 1 Vernon 363, 1 Ames Eq. Cas. 279; and see the cases collected in note 1.

but also in favor of the vendor or lessor,[2] by the application of the positive rule of mutuality already discussed.[3] And the rule applies, tho the contract was also within the provision of the statute as to agreements in consideration of marriage.[4] But in order that the taking of possession shall take it out of the operation of the statute in favor of the purchaser or lessee, possession must be taken with the consent of the vendor or lessor.[5] In Czermak v. Wetzel,[6] the defendant orally agreed to give the plaintiff a ten year lease of certain premises. Later a disagreement arose, defendant claiming it to be for only five years. The plaintiff entered, however, made improvements and demanded the execution of a ten year lease; specific performance was refused, because taking possession after such disagreement could place him in no better position. It would seem, however, that the vendor could not rightfully object to a decree giving the plaintiff a five year lease.

§ 133. Continuance in possession.

Altho by the weight of authority mere taking possession under the contract is sufficient to take the case out of the operation of the statute, it is well set-

2. Earle of Aylesford's case (1714) 2 Strange 733, 1 Ames Eq. Cas. 280; Kine v. Balfe (1813) 2 Ball & Beatty 343. Hence, if in an oral exchange of lands one party is given possession, this takes it out of the statute as to both parties. See Bigelow v. Armes (1882) 108 U. S. 10. See also Nibert v. Baghurst (1890) 47 N. J. Eq. 201.

3. See *ante* § 48.

4. Ungley v. Ungley (1877) L. R. 5 Ch. D. 887, 1 Ames Eq. Cas. 281. See 10 Harv. Law Rev. 60, discussing Nowack v. Berger (1896) 133 Mo. 24.

5. Cole v. White (1767) 1 Brown, Ch. Cas. 409, 1 Ames Eq. Cas. 282. See 16 Col. Law Rev. 524. As to whether the vendor or lessor may enforce where possession has been taken without such consent, *quaere*. It would seem that he should be able to do so; the purchaser or lessee should not be able to set up the other party's lack of consent to the taking of possession.

6. (1906) 100 N. Y. Supp. 167, 20 Harv. Law Rev. 335.

tled that mere continuance in possession is not sufficient whether the contract be for a lease[1] or a purchase.[2] But where the purchaser or lessor not only retains possession but puts repairs on the property, it has been held to make a memorandum unnecessary.[3] It has also been held that the payment of an increased amount under an oral contract by the lessee in possession was enough to enable him to get specific performance of the contract for a new lease,[4] but it is difficult to reconcile this decision with any of the current explanations of the doctrine of part performance.[5]

§ 134. Taking possession and improvements.

In a few jurisdictions the purchaser or lessee is required not only to take possession under the oral contract but also to erect valuable improvements.[1] In still others he must not only take possession but must pay a part or all of the purchase money;[2] while in

1. Smith v. Turner (1720) Precedents in Chancery 561 (cited), 1 Ames Eq. Cas. 282; Johnston v. Glancy (1835) 4 Blackf. (Ind.) 94.

2. See the criticism of O'Donnel v. O'Donnel (1911) 11 N. S. W. 340 in 25 Harv. Law Rev. 480.

3. Mundy v. Joliffe, (1839) 5 Myine v. Craig 167, 1 Ames Eq. Cas. 289; Morrison v. Herrick (1889) 130 Ill. 631, 22 N. E. 537. But see Frame v. Dawson (1807) 14 Ves. 386, 1 Ames Eq. Cas. 283; in that case the defendant orally agreed to grant the plaintiff a further lease of ten years in consideration of the plaintiff's repairing a party wall; the making of the repairs was held not to be sufficient to take the case out of the statute.

4. Wills v. Stradling (1797) 3 Ves. Jr. 378, 1 Ames Eq. Cas. 291.

5. The decision in Pawling v. Pawling (1895) 86 Hun 502, holding that a continuance in possession and the payment of the entire purchase money was enough to take the case out of the statute seems equally as difficult to sustain. If each element alone is wholly insufficient it is rather hard to see how both together could be enough.

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1. Burns v. Dagget (1886) 141 Mass. 368, 1 Ames Eq. Cas. 284. See 18 Harv. Law Rev. 137 in support of this view. See also Moore v. Small (1852) 19 Pa. 461. The possession must be exclusive and the improvements substantial. Gallagher v. Gallagher (1888) 31 W. Va. 9, 5 S. E. 297.

2. Wright v. Raftree (1899) 181 Ill. 464, 473, 54 N. E. 998.

four jurisdictions[3] the whole doctrine of part performance has been repudiated.

§ 135. Modern attempts to explain doctrine of part performance.

The position which courts of equity apparently first took in regard to the Statute of Frauds, viz., that any part performance took the case out of the operation of the statute, was easily understandable tho probably not justified because it was reading too much into the statute. The modern position, however, which limits the doctrine to certain acts and excludes others, while probably a step in the right direction, is open to the objection that no basis has yet been agreed upon which will explain all the decisions. Perhaps the most common theory is that only acts which are referable solely to some contract with reference to the land are sufficient to take the case out of the statute.[1] Thus, the taking of possession with the consent of the vendor is, according to the argument, referable solely to the contract in regard to the land of which possession is taken. There are two difficulties with this theory; one is that taking possession does not necessarily show

3. Albea v. Griffin (1838) 2 Dev. & Bat. Eq. (N. C.) 9, 1 Ames Eq. Cas. 288; Hanston v. Jandon (1869) 42 Miss. 380; Dean v. Cassiday (1899) 88 Ky. 572, 11 S. W. 601; Batton v. McClure (1828) Mart & Y. 333. In these states the purchaser or lessee is entitled to recover in *quasi*-contract any money paid and by the better view the increase in value to the land caused by the improvements erected. 9 Col. Law Rev. 961; 13 Harv. Law Rev. 410.

1. See Gunter v. Halsey (1739) Ambler 586, Miller v. Ball (1876) 64 N. Y. 286, Humphreys & Green (1885) L. R. 10 Q. B. D., 148. Hence if there is an oral contract to make mutual wills, the making of a will by one party is not part performance because it is not an act referable solely to any contract. Hale v. Hale (1894) 90 Va. 728, 19 S. E. 739; Caton v. Caton (1866) L. R. 1 Ch. App. 137, 14 Col. Law Rev. 272. If the will itself is clearly referable to the contract it is arguable that relief should be granted because of the survivor's change of position in undergoing risk for which money damages would not be adequate compensation. 25 Harv. Law Rev. 571.

some contract with reference to the land; it might be that the entry was under a mere parol license of the vendor, without any contract. The other objection is that even assuming that it does necessarily show the existence of some contract, it does not adequately explain why that should be enough to take the case out of the statute and allow oral proof of the terms of the contract.[2] It must be admitted, however, that tho the explanation is not satisfactory it is the only one which is even applicable to the majority view.

Where the taking of possession is not enough without the making of valuable improvements on the land, it is more common to explain the giving of specific performance upon the theory that equity is enforcing the contract to avoid irreparable injury[3] to one who has acted on the strength of the other's promise. It is to be observed that this will usually, if not always, operate in favor of the purchaser or lessee only; if in these jurisdictions a vendor or lessor is given specific performance it must be entirely on the ground of mutuality.[4]

As a matter of principle it would seem that this minority view and the theory by which it is usually explained, is the preferable one. Under this theory the jurisdiction of equity might perhaps be better classified as jurisdiction to prevent fraud[5] rather than to give specific performance and as such its enforcement of contracts which are without the letter of the Statute of Frauds may be justified.

Historically, the doctrine of part performance even when logically extended to all acts of part performance is really anomalous, because it is a plain violation of the terms of the statute.

2. See 9 Harv. Law Rev. 457.

3. Frame v. Dawson (1807) 14 Ves. 386, 1 Ames Eq. Cas. 283.

4. See *ante* §§ 48, 132. See also 18 Harv. Law Rev. 137, 138.

5. For example, see Clinan v. Cooke (1802) 1 Schoales & Lefroy 22. For a discussion of both theories see 13 Col. Law Rev. 150.

§ 136. Irreparable injury without change of possession.

In Clerk v. Wright,[1] the purchaser, according to the conveyancing custom in England, had given orders to have conveyances drawn up and had gone several times to view the land. Here there was irreparable injury because no recovery whatever in quasi-contract, but it was of relatively small amount; and specific performance was refused.

In Malins v. Brown[2] M negotiated with W to buy 40 acres of land for $1500; the defendant's testator had a mortgage on this and other land. M declined to complete the purchase unless defendant's testator would release the land from the mortgage; the latter then orally agree to do so upon payment of $700; M paid the $700 but the release was then refused. Specific performance was granted here because M has involved himself in a contract with W from which he can not get released.[3]

§ 137. Personal services for promise to devise.

Where the plaintiff has rendered services in reliance upon a promise to convey, usually by devise, a

1. (1737) 1 Atkyns 12, 1 Ames Eq. Cas. 294.

2. (1850) 4 N. Y. 403 1 Ames Eq. Cas. 304.

3. See also Slingerland v. Slingerland (1888) 39 Minn. 197, 39 N. W. 146, where in pursuance of the oral contract the plaintiff had dismissed actions against the defendant and the bank of which the defendant was president; Dunckel v. Dunckel (1894) 141 N. Y. 427, 36 N. E. 405, where the plaintiff in pursuance of the oral contract had paid notes of her deceased husband to various holders. If irreparable injury has been caused by fraudulent representations of the defendant the plaintiff's position is rendered still stronger. Green v. Green (1886) 34 Kansas 740, 10 Pac. 156; Peek v. Peek (1888) 77 Cal. 106, 19 Pac. 227. On the other hand, altho there has been a change of position on the part of the plaintiff it is not sufficient to take the case out of the statute if the change is distinctly for the better. See Pond v. Sheean (1890) 132 Ill. 312, 23 N. E. 1018, where in consideration of the plaintiff's parents allowing the defendant to take and rear the plaintiff the defendant orally agreed to leave all his property to the plaintiff; the court refused relief on the ground that the plaintiff was

piece of land, the weight of authority[1] is that specific performance cannot be obtained, coming within the modern rule already discussed[2] that neither partial nor complete payment of the purchase money or its equivalent will take the case out of the statute. There is, however, a strong minority of jurisdictions giving specific performance.[3] Where circumstances were such that it was impossible for the plaintiff to take possession and where the plaintiff has served for many years and the recovery in quasi contract is held barred by the Statute of Limitations except as to the last six years,[4] (or whatever the statutory limit is), specific performance may be justified on the ground of irreparable injury to the plaintiff.[5] Another element which has probably had some influence on these minority decisions is the fact that the plaintiff is—in devise cases—seeking relief against volunteers.[6]

§ 138. Oral promise to make a gift.

In most jurisdictions it is now well settled that if the owner of land promises to give it to another and the latter in reliance upon the expected gift takes posssession and erects permanent improvements, he may compel specific performance of the promise.[1] The

much better off than if she had stayed with her parents. There being an indivisible contract for both realty and personalty relief was denied as to the personalty also.

1. Maddison v. Alderson (1883) L. R. 8 App. Cas. 467, 1 Ames Eq. Cas. 295. See 14 Harv. Law Rev. 64.

2. See *ante* § 131.

3. Gladville v. McDole (1910) 247 Ill. 34, 93 N. E. 86; Kinyon v. Young (1880) 44 Mich. 339; 6 N. W. 835; Hiatt v. Williams (1880) 72 Mo. 214.

4. 25 Harv. Law Rev. 410; 21 *id.* 544.

5. See *ante* § 136. Where the contract thus enforced is unilateral, the performance by the plaintiff does double duty; it brings the contract into existence by performing the office of accepting the offer and it also serves to prevent the operation of the statute.

6. See *ante* § 127, *post* § 344. See 14 Harv. Law Rev. 544.

1. Freeman v. Freeman (1870) 43 N. Y. 34, 1 Ames Eq. Cas. 306; Seavey v. Drake (1882). 62 N. H. 393, 1 Ames Eq. Cas. 308. In the

historical explanation of this is probably that at the time the question first came up in equity, the test of consideration for a contract had not been settled at common law and the equity court considered that the making of the improvements in reliance upon the promise created a contract.[2] At the present time, however, there is no contract at common law[3] because the detriment suffered by the promisee was not suffered in exchange for the promise, but equity still gives specific performance of the promise. Since it can no longer be placed upon the ground of giving specific performance of contracts,[4] it is usually explained as being based upon the prevention of fraud on the donee.[5] In many cases, however, the donee could be adequately compensated in money for the improvements erected.

§ 139. Oral agreements for easements.

Oral agreements for easements, sometimes by way of sale,[1] and sometimes by way of gift,[2] have been en-

former case there may have been a contract according to modern law but the decision was not placed on that ground.

2. Even where it is clear that the intent was to make a gift and not a contract courts still speak of the plaintiff's act as being consideration or "consideration in equity." Young v. Overbaugh (1875) 145 N. Y. 158. Fouts v. Roof (1898) 171 Ill. 568, 50 N. E. 653.

3. Presbyterian Church v. Cooper (1889) 112 N. Y. 517, 20 N. E. 352. But there are many cases in the United States *contra*. 17 Harv. Law Rev. 278; 15 *id.* 312. What really is needed here is a doctrine similar to the civil law doctrine of *culpa in contrahendo* which would make one liable in tort for the damages actually sustained by the plaintiff in reasonable, *bona fide* reliance upon the defendant's promise.

4. It might be argued that in these cases the putting of the donee in possession is in substance a livery of seisin and that equity is justified in giving effect to it tho oral, where damage would be irreparable.

5. Freeman v. Freeman (1870) 43. N. Y. 34, 1 Ames Eq. Cas. 306.

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1. East India Co. v. Vincent (1740) L. R. 35 Ch. Div. 694 (cited), 1 Ames Eq. Cas. 310; 15 Harv. Law Rev. 321.

2. Van Horn v. Clark, (1898) 56 N. J. Eq. 476, 40 Atl. 203, (gratuitous oral license to get water from a spring, acted upon by licensee). But see 13 Harv. Law Rev. 54.

forced specifically. Here courts of equity have overcome not only the objection of the statute of frauds but of the common law requirement of a deed.[3] In most, if not all, of the cases, the theory has apparently been that of preventing irreparable injury to the plaintiff. In Jackson v. Cator,[4] the defendant leased to X for thirty years, reserving all trees, shrubs, etc.; X assigned to the plaintiff; the plaintiff notified the defendant that he expected to make certain alterations; the defendant consented and the plaintiff went to a large expense in reliance upon the defendant's oral license; the defendant later threatened to cut down trees so that the value of the plaintiff's alterations would have been destroyed; the plaintiff asked for and received an injunction against the defendant's cutting any trees during the remainder of the term.

In Joseph v. Wild,[5] the plaintiff and defendant owned adjoining unimproved lots; the plaintiff being about to build on his lot, they made an oral contract whereby the plaintiff was to erect the wall of the building on the division line and to erect a stairway over the defendant's land for entrance to the upper story of the plaintiff's building, the defendant to have the use of the wall when he should build. The plaintiff having erected a temporary stairway the defendant threatened to remove it fifteen years later. It was held that since the plaintiff had expended a large amount of money in erecting his building in reliance on the oral contract, he was entitled to relief. The plaintiff, having arranged his building for the outside stairway, would obviously be irreparably damaged if it were removed.

§ 140. Relief of plaintiff solely in equity.

Since there is no contract at law in the cases of promises to make gifts, it is obvious that there is no

3. Tiffany, Real Property § 315.
4. (1800) 5 Ves. 688, 1 Ames Eq. Cas. 311.
5. (1896) 146 Ind. 249, 45 N. E. 467.

remedy whatever at law because there is no primary common law right. Even where there is a contract, however, and therefore a common law primary right, there is no common law remedy because the equitable doctrine of part performance is not recognized by common law courts.[1] The result is that if the plaintiff's equitable right to specific performance has been cut off by a transfer to a *bona fide* purchaser, his remedy is still in equity tho he knows of the transfer before bringing suit.[2] Since he can not get specific performance equity will give him what it can as a substitute therefore, viz., compensation in money.[3]

§ 141. Fraudulent representation in regard to the memorandum.

Even in jurisdictions which hold that the mere taking of possession prevents the operation of the statute, courts are sometimes inclined to explain the doctrine of part performance on the ground of fraud; i. e. that it would work a fraud on the plaintiff if specific performance were refused. This, however is using the term fraud in a very broad sense. In a much more restricted sense, fraud itself without reference to part performance, may operate to take a case out of the Statute of Frauds. If the defendant has fraudulently induced the plaintiff to believe that a memorandum has been properly made or if he has fraudulently obtained possession of the memorandum from the plaintiff and destroyed it,[1] equity will give specific reparation for

1. O'Herlihy v. Hedges (1803) 1 Sch. & Lef. 123, 130.

2. Jervis v. Smith (1840) Hoffman, Ch. Rep. 470, 1 Ames Eq. Cas. 313.

3. Jervis v. Smith *supra*: "If the only redress is in this court, and the contract would have been enforced had the property remained in the vendor, it follows that damages may be recovered through the instrumentality of this court."

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1. Mullet v. Halfpenny (1699) Precedents in Chancery (cited) 1 Ames Eq. Cas. 315.

the fraud by giving specific performance just as if the memorandum had been introduced in evidence in the case.[2]

§ 142. Other fraudulent representations.

Even tho the fraudulent representation has no reference to the memorandum, it will—in a clear case—prevent the operation of the statute. In Peek v. Peek[1] the plaintiff's father had orally promised to marry the defendant and on or before the marriage to convey to her a piece of land. By repeated promises and protestations which were obviously fraudulent he induced the defendant to marry him without the conveyance and on the morning of the marriage conveyed the land to the plaintiff, his son by a former marriage. It was held that this was sufficient to take the case out of the statute, especially as against a volunteer.[2]

IV. Plaintiff's default or laches.

§ 143. Conditions precedent in bilateral contracts.

Where, in a bilateral contract there is a condition precedent with which the plaintiff has for any reason failed to comply, the condition is as efficacious in equity as at law to defeat the plaintiff. In Earl of Feversham v. Watson,[1] the plaintiff who was about to marry a daughter of Sir George Sands, agreed to settle £500 *per annum* upon her for separate maintenance and to purchase £840 *per annum* within twenty miles of London and settle it upon himself for life, remainder to his intended wife for life with remainders over;

2. The mere refusal of the defendant to sign the memorandum is not enough to prevent the operation of the statute. Wood v. Midgely (1854) 5 DeG. Mc. N. & G. 41.

1. (1888) 77 Cal 106, 19 Pac. 227.
2. See also Green v. Green (1886) 34 Kan. 740.

1. (1678) Freeman v. Chancery Cases 35, 1 Ames Eq. Cas. 317.

Sir George Sands promised that as soon as the plaintiff should perform the promises, he would settle £3000 *per annum* upon the plaintiff for life, remainder upon the plaintiff's wife for life, with remainders over. The plaintiff did all except purchase the £840 *per annum;* his wife died. The court refused to decree specific performance because the express condition precedent in Sir. George Sands' promise had not been performed, altho, of course it could not now be performed due to the wife's death.[2]

So, where the defendant has promised to buy or sell at a certain price to be fixed by arbitrators or valuers, the arbitration or valuation is a condition precedent and must be complied with before the plaintiff can get specific performance.[3] Where the defendant has fraudulently prevented the valuation or arbitration from being made, however, equity should, if possible, give specific reparation for the fraud[4] and this usually involves the giving of specific performance of the defendant's promise. The mere fact, however, that if relief of some sort is not given the defendant would be enriched, seems to be more properly a ground for giving quasi contractual relief[5] and not for specific performance, tho some cases have given specific performance on this ground.[6] The fact that no mode of valuing was provided by the contract will not prevent equity from giving specific performance.[7]

2. The fact that the plaintiff has not defaulted in his own performance is not material. In Cheeke v. Lord Lyle (1674) 2 Freeman 303, the marriage articles provided that the plaintiff should have £2500 if he should within four years after the marriage settle £400 per annum upon his wife; the wife having died a month after the marriage the plaintiff was unable to obtain specific performance tho the four years had of course not expired.

3. Milnes v. Gery (1807) 14 Ves. 400; Hug v. Van Burkleo (1874) 58 Mo. 202.

4. Biddle v. Ramsey (1873) 52 Mo. 153 (appointing prejudiced assessors).

5. Hug v. Van Burkleo (1824) 58 Mo. 202.

6. Strohmaier v. Zeppenfeld (1877) 3 Mo. App. 429.

7. Duffy v. Kelly (1897) 55 N. J. Eq. 627, 37 Atl. 597.

§ 144. Failure to comply with terms of option.

If the plaintiff has failed to comply with the express terms of an option before the time for acceptance has elapsed, he cannot get specific performance[1] because there is no primary right[2] upon which to base his suit.[3] The reason for failing to make a proper acceptance in due time is of no importance.[4]

§ 145. Plaintiff's breach of his own promise as a bar.

Even tho the defendant's promise is not made expressly conditional upon the performance of some act or the happening of some event, a failure of the plaintiff to perform substantially[1] his part of the contract may prevent his getting specific performance. In Gannett v. Albree[2] the bill was brought for specific performance of an agreement to renew a lease; the lease provided that if the lessee should cease to occupy the premises, he should have the right to underlet the same for use as a private dwelling and "not for any public or objectionable purpose." The lessee assigned to the plaintiff who with the defendant's consent opened a boarding school for young ladies; later the plaintiff sublet to one Surett who used the premises as a boarding house. Altho perhaps the plaintiff might have recovered at common law for the breach of the contract

1. Ranelagh v. Melton (1864) 2 Drewry & Smale 278, 1 Ames Eq. Cas. 319.

2. Courts are inclined in such cases to say that "time is of the essence of the contract;" but the entire lack of any contract is a more fundamental and satisfactory reason.

3. The option contract having expired by its own limitation and no other contract having come into existence.

4. Dikeman v. Sunday Creek Coal Co. (1900) 184 Ill. 546, 56 N. E. 864, (delay due to inadvertance of plaintiff's agent).

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1. If the failure amounts to only a slight deficiency of the *res*, the plaintiff may be given specific performance, with compensation to the defendant for the slight defect. See *ante* §§ 121.

2. (1869) 103 Mass. 372, 1 Ames Eq. Cas. 331.

to renew, he was refused specific performance in equity, because of the use to which the premises had been put.[3]

§ 146. Representation as to intent not fulfilled by plaintiff.

In Beaumont v. Dukes,[1] a bill for specific performance was brought by the vendor. The defense set up was that the plaintiff's auctioneer announced at the auction that the vendor intended to make certain street improvements in the vicinity of the property; that the defendant bought relying upon this statement; and that the plaintiff had refused to make the alterations; specific performance was refused. Here the defendant probably could not have recovered at common law because there was no promise by the vendor that he would make the improvements and an action for deceit could be defeated by showing that the representation was made *bona fide*, but that the vendor later changed his mind. Specific performance was refused because the plaintiff's hands were rendered unclean[2] by his failure to make good the representation.

§ 147. Plaintiff's insolvency.

If one who has contracted for a lease sues for specific performance, his supervening[1] insolvency will usually be held a bar unless he tenders the full amount

3. See also Los Angeles etc. Oil Co. v. Occidental Oil Co. (1904) 144 Cal. 528, 78 Pac. 25, (the plaintiff had failed to perform his promise to develop the land for oil); Bodwell v. Bodwell (1894) 66 Vt. 101, 28 Atl. 870, (default in promise to allow his divorced wife to care for their son); Coates v. Cullingford (1911) 131 N. Y. Supp. 700, 12 Col. Law Rev. 158, 170 (plaintiff's violation of equitable servitude a bar to enforcing it against the defendant).

1. (1822) Jacob 422, 1 Ames Eq. Cas. 323.

2. See *ante* § 30.

1. Or if the plaintiff's insolvency at the time of contract was not known to the defendant.

of the rent for the whole term.[2] And where he is bound to make considerable repairs which cannot be made until after entry, it may prevent entirely the specific execution of the lease.[3]

Similarly a purchaser who has become insolvent cannot insist upon credit even tho the contract provides for it;[4] and if a purchaser should assign such a contract to another who is insolvent the latter cannot insist upon specific performance unless he pays cash.[5] On the other hand, if the plaintiff has fully performed, the fact that he is insolvent and that because of such insolvency the defendant fears that he may not be able to collect an independent claim is no bar to specific performance.[6]

§ 148. Breach by plaintiff acted upon justifiably by defendant.

If after the making of a specifically enforcible contract to convey property, the purchaser first learns that there is a defect in the vendor's title, he is justified, after waiting a reasonable time for the vendor to remedy the defect, to repudiate the contract; if he does so, changing his position upon the supposition that he cannot get the land, the vendor cannot by repairing the defect later insist upon performance.[1] The gist

2. See Price v. Asheton (1835) 1 Y. & C. 441, 444, in which it was held that it was a matter of discretion for the court; and see McNally v. Gradwell (1866) 16 Ir. Chan. 512.

3. See Buckland v. Hall (1803) 8 Ves. 92.

4. Carter v. Phillips (1887) 144 Mass. 100, 10 N. E. 500 (contract to buy a business). A similar rule prevails now at common law. Williston, Sales § 576, 577. And see Rice v. D'Arville (1895) 162 Mass. 559, 39 N. E. 180, where the plaintiff was refused specific performance of defendant's promise not to sing for others because the plaintiff's ability to pay the defendant depended upon the outcome of the opera season.

5. Rice v. Gibbs (1894) 40 Neb. 264, 58 N. W. 724.

6. Thompson v. Winter (1889) 42 Minn. 121, 43 N. W. 796.

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1. Bellamy v. Debenham (1891) L. R. 1 Ch. 412, 1 Ames Eq. Cas. 325. In that case the plaintiff asked for damages in the

of the defense is that the defendant can properly object to being kept in suspense; hence, if the defect has been remedied before he knows of it, he cannot complain of it. Where he knew of the defect at the time of entering the contract it would seem that the same principles would apply[2] except that he is probably under an obligation to wait a longer time than where he was ignorant of the true state of affairs.

In Dowson v. Solomon[3] the plaintiff had contracted to sell to the defendant a leasehold, the conveyance to be made July 20. The insurance expired June 24 and the plaintiff renewed it for one month only. The meeting for completing the conveyance was put off until Aug. 26. It was not till then that the defendant learned that the insurance had expired July 24 and that the lease was therefore subject to forfeiture by the lessors; the defendant offered to complete if the plaintiff would procure a waiver of the forfeiture from the lessors but this offer was refused and on Sept. 7 the defendant wrote to the plaintiff declining to go on. Later the plaintiff reinsured and procured the waiver and then sought specific performance. Relief was refused, the court saying that the waiver came too late. The ground for refusing specific performance here also is that it was unfair to keep the defendant in suspense as to the title. The same reasoning applies where before the time for the plaintiff's performance he repudiates the contract and the defendant changes his position in reliance upon such repudiation.[4]

§ 149. Effect of mere delay by plaintiff.

It is sometimes said that at common law time is

alternative but since the common law rule on this point is now substantially the same as the equity rule, he failed also to get that. See Williston, Sales §§ 576, 577.

2. At least, if the plaintiff had agreed to remedy the defect.

3. (1859) 1 Drewry & Smale 1, 1 Ames Eq. Cas. 418.

4. See Pyatt v. Lyons (1893) 51 N. J. Eq. 308, 27 Atl. 934; Guest v. Homfray (1801) 5 Ves. 818. And see Williston, Sales § 578.

always of the essence of a contract; this is true, however, only of mercantile contracts and even there it does not necessarily mean that one party is excused if the other does not perform at the very moment, but merely that because of the possible fluctuation in price, time is an important and perhaps controlling element.[1] Since the contracts which equity specifically enforces are rarely to be classified as mercantile contracts, time is usually not of the essence. In the ordinary land contract a delay of weeks or even months may not and frequently does not give rise to a defense by the other party.[2] In Parkin v. Thorold,[3] the plaintiff agreed on July 25 to sell to the defendant, the abstract to be delivered in ten days, the purchaser to pay a deposit and sign an agreement to complete the purchase on or before October 25. Difficulties in regard to the title arose. On October 21 the defendant gave notice to the plaintiff to complete on or before November 5 or he would treat the contract as at an end. On January 8 the plaintiff offered to produce the deed but the purchaser stated that he had long ago abandoned the contract. On February 25 the purchaser sued to get back the deposit. On March 1 the vendor filed his suit for specific performance. In giving the relief

1. Of course an inexcusable failure to perform on time necessarily gives the other party a cause of action for such breach; and sometimes this is all that is meant by courts in saying that "at law time is always of the essence." Whether such a breach is an excuse to the other party is an entirely different question. Williston, Sales § 453.

2. See Seton v. Slade (1802) 7 Vesey 265 (specific performance allowed to the vendor after the purchaser had sued for and recovered the deposit.).

3. (1852) 16 Beav. 239, 1 Ames Eq. Cas. 327. Where the suit has been brought against the party in default courts will frequently in giving a decree for specific performance fix a period within which the defendant must complete or lose his rights under the contract; Southern Pac. Ry. Co. v. Allen (1896) 112 Cal. 445, 44 Pac. 796 (six months allowed to defendant purchaser to complete purchase or be forclosed); Cross v. Mayo (1913) 167 Cal. 594, 140 Pac. 283 (ten days allowed).

prayed for, the court held that the exact time for performance—October 25—was not essential; that although express notice will make time of the essence where a reasonable time is specified on the notice for the completion of the contract, the notice of October 21, did not have that effect, because the time specified—till November 5—was too short; and also that there had been no such laches or acquiescence in the defendant's attempted abandonment of the contract to preclude him from insisting now on specific performance. The phraseology used by the court—that one party could make time of the essence by giving notice to complete within a time limit which is reasonable—is unfortunate. The actual effect of such a notice is to prevent any question of waiver by delay and perhaps to help somewhat to determine what amounts to a reasonable time for completion in the particular case.

§ 150. Effect of plaintiff's delay coupled with other circumstances.

Where the plaintiff's delay has occurred after part performance[1]—especially if the part performance has benefitted the defendant[2]—specific performance will more likely be given than if there had been no such part performance. On the other hand, if during the delay the property has changed considerably in value this additional fact will tend to influence the court against granting relief.[3]

1. For example, if the purchaser has been placed in possession; see Brown v. Guarantee etc. Co. (1888) 128 U. S. 403 (purchaser also made large expenditure in improvements; Jones v. Robbins (1849) 29 Me. 351 (plaintiff purchaser in possession but defaulted 58 days in tendering an installment because of illness). A similar doctrine prevails now at law; see 9 Harv. Law Rev. 148.

2. Edgerton v. Peckham (1844) 11 Paige 352 (suit by purchaser who had paid two thirds of purchase money).

3. Peters v. Delaplane (1872) 49 N. Y. 362 (delay of seventeen years and increase of tenfold in value); Combes v. Scott (1890) 76 Misc. (N. Y.) 662 (delay of six years and increase of twenty to

§ 151. Time expressly made of the essence.

Altho it is frequently said[1] that time may be made of the essence by agreement of the parties, the statement is not strictly true as shown by many decisions.[2] The real effect of such a stipulation seems to be that it is evidence—more or less weighty—tending to show that time was really so important that a delay by the plaintiff should bar him from equitable relief. The stipulation is therefore to be considered along with all the other facts and circumstances of the case.[3] The relief against forfeitures, especially in mortgages and bonds with penalties[4] was one of the earliest heads of equity jurisdiction; and wherever the express stipulation would operate to bring about a serious forfeiture of property interests, it would seem clear that equity should not enforce the provision.[5] If, on the other hand, it operates merely as an express condition precedent to the obtaining of a property interest

fifty fold in value). In Kien v. Stukely (1722) 1 E. R. 506 the defendant purchaser had intended to pay for the land with the proceeds of the sale of South Sea Stock which declined greatly during plaintiff's delay in making title; for this reason specific performance was refused.

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1. In Grey v. Tubbs (1872) 43 Cal. 359; Sowles v. Hall (1890) 62 Vt. 247, 20 Atl. 810. In Hubbell v. Schoening (1872) 49 N. Y. 326, the court said that "time is not of the essence of the contract unless made so by the terms of the contract."

2. See Cross v. Mayo (1913) 167 Cal. 594, 140 Pac. 283; Hall v. Delaplane (1856) 5 Wisc. 216.

3. The argument for a strict enforcement of such a provision is that the proper protection of business interests requires uniform enforcement of certain rules; and that the court cannot make over the contract for the parties. Brown v. Ulrick (1896) 48 Neb. 409, 67 N. W. 168. For a recent discussion of the subject see 29 Harv. Law. Rev. 791. See also 22 Harv. Law Rev. 543.

4. See *post* § 457.

5. Wells v. Smith (1837) 8 Paige 22. In Stedman v. Drinkle (1916) A. C. 275, the court took the middle ground of denying specific performance but relieving the plaintiff against forfeiture of money paid; this is to be commended.

which the party has not before possessed, equity may properly refuse specific performance if the plaintiff has failed to observe the stipulation, and there has been little or no part performance.[6]

In Vernon v. Stephens[7] the purchase price agreed upon was £1200 and 100 guineas; the purchaser had paid some and defaulted as to the rest of the purchase money, whereupon it was agreed that if the purchaser failed to pay by a certain day, the contract was to be cancelled. The purchaser then paid £1000 but defaulted as to the residue. A further agreement was then made whereby a further day was given and the purchaser agreed that he would lose all the money which he had advanced before and the benefit of the contract if the money should not be paid on the day. The purchaser again made default and later sued for specific performance. The court, being of the opinion that the vendor would be adequately compensated by interest on the delayed payments granted the relief. It is to be here noted that by the very large payment the purchaser had become substantially the owner of the property and hence the later agreements were somewhat like conditions subsequent in mortgages. Frequent repetition of the statement that the parties may make time of the essence has brought several unfortunate decisions. In Heckard v. Sayre[8] the plaintiff, having contracted to buy land for $900 and having paid $600, defaulted six days in paying the note for the other $300. The note provided that time should be of the essence and the court refused specific performance. It is believed that this decision will not be generally followed and that a more liberal rule will prevail, at least as to the forfeiture of money already paid.

6. Lloyd v. Rippingale (1836) 1 Younge & Collier, Exch. 410 (cited), 1 Ames Eq. Cas. 335.

7. (1722) 2 Peere Wms. 66, 1 Ames Eq. Cas. 338.

8. (1874) 34 Ill. 142, 1 Ames Eq. Cas. 340. See also Iowa etc. Land Co. v. Mickell (1875) 41 Ia. 402 in which the plaintiff lost $4000 in improvements because he tendered $165 instead of $168 for the second installment.

§ 152. Time made of the essence by nature of the property or other circumstances.

Where the property contracted to be sold fluctuates greatly in value, it is usually a fair inference that the parties understood time to be of great importance without an express stipulation; hence any delay which might seriously affect the defendant's interests entitles him to refuse to go on with the contract,[1] the rule being practically identical with the common law rule[2] as to mercantile contracts and for the same reason.

Tho the property itself is not of such sort as to make time an essential element of the contract, the circumstances surrounding the contract may show that the time set for performance was an important factor. In Tilley v. Thomas[3] the plaintiff had contracted on December 14 to sell a lease of Cambridge Lodge to the defendant, possession to be given on January 14. The plaintiff was unable to show a complete title on January 14; on June 5 the plaintiff asked specific performance having perfected the title. Specific performance was refused on the ground that it was known to the plaintiff that the defendant expected to use the premises as his own residence immediately after January 14.

§ 153. Tender of performance by vendor.

As already pointed out,[1] a contract for the sale and purchase of property is considered by common law courts at the present time as including mutual concurrent conditions: if either party wishes to obtain

1. Macbride v. Weeks (1856) 22 Beav. 533 (lease of a mine); Hipwell v. Knight (1835) 1 Y & C. 401, 415, (sale of stock); Edgerton v. Peckham (1844) 11 Paige 352 and cases cited.
2. Williston, Sales §189.
3. (1867) L. R. 3 Ch. App. 61, 1 Ames Eq. Cas. 336.

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1. See *ante* § 143.

a judgment against the other for breach, he must be able to show that at or near the time set for performance (depending upon whether time is or is not an essential element), he offered to exchange performances with the other party.[2] In equity, however, there is no such strict requirement, because equity is able to give a conditional decree which will protect the defendant and secure to him the plaintiff's performance in exchange for his own. Thus in Rutherford v. Haven[3] it was held that it was not fatal to the vendor's suit for foreclosing the buyer's right in the property that he had not tendered a deed to the buyer. In the discretion of the chancellor, however, costs may be awarded against a plaintiff who has failed to tender performance before bringing suit.[4]

§ 154. Specific performance and the Statute of Limitations.

On the ground that the Statute of Limitations expressly mentioned only "actions" and not "suits," courts of equity held that they were not bound by the statute.[1] It was, however, usually looked to as furnishing the longest period of permissible delay;[2] but while a much shorter period than that provided by the statute might bar the plaintiff, the circumstances might be such that he was entitled to a longer period in which to bring his suit.[3]

In a few jurisdictions at the present time there are statutes of limitations applying expressly to equity suits.[4]

2. 7 Col. Law Rev. 151, 153.

3. (1861) 11 Iowa 587, 1 Ames Eq. Cas. 342. See also Lesley v. Morris (1873) 9 Phila. 110.

4. Brown v. Ward (1899) 110 Ia. 123, 81 N. W. 247; Boston v. Nichols (1868) 47 Ill. 353.

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1. Talmash v. Muggleston (1826) 4 L. J. Ch. 200, 1 Ames Eq. Cas. 343.

2. Norris v. Haggin (1889) 136 U. S. 386; Hutchison v. Grubbs (1885) 80 Va. 251.

3. See Arnett v. Finney (1886) 41 N. J. Eq. 147, 3 Atl. 696.

4. See 25 Cyc. 1057, note 54.

Where the statute is applied, either by way of analogy or because of the express provisions of the legislative act, it begins to run in specific performance cases, from the time that a suit for specific performance could have been brought.[5] Where, however, the purchaser has been put in possession and pays all the purchase price, it would seem that the statutory period ought not to begin to run till the vendor, who occupies substantially the position of a passive trustee, has repudiated to the knowledge of the purchaser.[6] Such a suit is in substance a suit to quiet title[7] rather than a suit to get title.

§ 155. Foreclosure of purchaser's property right.

Tho the relation of vendor and purchaser is in many respects closely analogous to that of mortgagee and mortgagor, there is one substantial difference; the mortgagee in order to foreclose the interest of the mortgagor must institute some sort of court proceedings and usually have the property sold; but the vendor in case of substantial delay by the purchaser may, by giving notice to the latter that he must complete within a certain time, foreclose his interest in the property,[1] provided that the time thus allowed is reasonable[2] under all the circumstances of the case. If the vendor does not wish to take the chances of fixing a reasonable period, he may, of course, appeal to a

5. Bruce v. Tilson (1862) 25 N. Y. 194, 1 Ames Eq. Cas. 345.
6. Day v. Cohen (1884) 65 Cal. 508, 4 Pac. 511.
7. See *post* §§ 413-415.

1. Webb v. Hughes (1870) L. R. 20 Eq. 281, 286: "if any unnecessary delay is created by one party, the other has a right to limit a reasonable time within which the contract shall be perfected by the other." See also Lysaght v. Edwards (1876) L. R., 2 Ch. Div. 499.

2. In Pegg v. Wisden (1852) 16 Beav. 239 the court held that under all the circumstances six weeks was too short a period to set for the purchaser to complete.

court of equity which will fix a limit within which the purchaser must perform;[3] this limit corresponds roughly to the time for redemption which statutes have allotted to mortgagors after foreclosure.[4]

V. Fraud, misrepresentation and concealment.

§ 156. Rescission and specific performance.

Where fraud of such a serious character has been practiced by one party to a contract upon the other that it will be recognized at common law as a defense to the defrauded party if sued for breach, equity will, to preserve this common law defense to the defrauded party, declare the contract rescinded and order it to be delivered up and cancelled. This subject will be dealt with in the chapter on Rescission.[1] Since, however, equity has always considered specific performance as an extraordinary remedy to be given only in the sound discretion of the chancellor, misconduct on the part of the party asking for specific performance which is much less heinous than what common law courts regard as fraud, will be a bar to such equitable relief, especially if there be coupled with such misconduct other elements, such as hardship etc. which make it inequitable to force the defendant to perform.[2] In fact, as will be pointed out later,[3] even innocent misrepresentation when coupled with other elements may operate to prevent the plaintiff from getting equitable relief.

It may be argued that the denying of specific per-

3. Southern Pac. Ry. Co. v. Allen (1896) 112 Cal. 455 (six months allowed to complete).

4. Lysaght v. Edwards (1876) L. R. 2 Ch. Div. 499.

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1. See *post* Chap. VII. This is a part of equity's *quia timet* jurisdiction.

2. See Kelly v. Railroad (1888) 74 Cal. 557, 16 Pac. 386 (fraud without damage held a bar to specific performance).

3. See *post* § 164.

formance but refusing rescission thereby allowing the plaintiff in the suit for specific performance to sue and recover at law instead is of little value to the defendant because ordinarily the rule of damages is that he must pay the plaintiff the loss of his bargain; the answer to this is that while the misconduct of the plaintiff may not give a defense in point of law, the jury will almost certainly be influenced by it and will give a verdict for a less sum than the plaintiff would be entitled to according to the strict rule of damages, and such a verdict will not be disturbed.[4]

§ 157. Active misrepresentation or concealment by a fiduciary.

When a fiduciary deals with his beneficiary or principal, he must divest himself of the advantage which his position has given him, by making a full disclosure of all facts relative to the transaction[1]—especially such facts as he has obtained by reason of the fiduciary relation. In Cadman v. Horner,[2] the plaintiff who had been the agent of the defendant contracted to buy some land from him for $600; in defense to the suit for specific performance the defendant sought to show misrepresentation as to value and as to the amount of repairs needed. The court in dismissing the bill, after commenting on the fact that the defendant must have known the value from the fact that he had recently purchased it, said ". . .

4. This is sometimes expressed by saying that jurors are chancellors.

1. If an agent attempts to act for both parties to a transaction without full disclosure of his relation to each, it is at least a bar to specific performance against the innocent party, if not also basis for rescission. Marsh v. Buchan (1890) 46 N. J. Eq. 595, 22 Atl. 128; Hesse v. Briant (1856) 6 De. G., McN. & G. 623.

2. (1810) 18 Ves. 10, 1 Ames Eq. Cas. 351. See also Kimber v. Barber (1872) 8 Ch. App. 51; Margraf v. Muir (1874) 57 N. Y. 155 (parties in unequal position because of plaintiff's residence near the land).

yet as upon the evidence the plaintiff has been guilty of a degree of misrepresentation, operating to a certain, though a small extent, that misrepresentation disqualifies him from calling the aid of a court of equity, where he must come, as it is said, with clean hands."

In Byers v. Stubbs[3] the defendant who lived 100 miles away from certain land that he owned, wrote to the plaintiff who lived in the vicinity of the land offering him all over $500 that he could get for the land. The defendant, not disclosing that there had been a "boom" in land values in the neighborhood, procured from the defendant an option on the land which he later accepted. The court refused to decree specific performance on the ground that the plaintiff should have disclosed the facts to the defendant, saying: "It is true, the relation of principal and agent was not consummated between complainant and defendant; but the proposition of the latter to employ the former, as agent to sell the land, placed them in a relation, each to the other, which demanded open and fair dealing." Unless there was an express reliance[4] by the defendant upon the plaintiff it is rather difficult to make out a fiduciary relation. But the decision is perhaps supportable on the ground that tho there was no fiduciary relation there was sharp practice and since the real value of the land was probably at least double the option price, the hardship on the defendant would have been severe.

§ 158. Misrepresentation by a non-fiduciary.

The dividing line between a misrepresentation by a non-fiduciary which will bar specific performance and one which will not, is necessarily hard to define because so much depends upon the other circumstances. Where an auctioneer stated that the land offered was "uncommonly rich water meadow land" whereas it was not

3. (1887) 85 Ala. 256, 4 So. 755, 1 Ames Eq. Cas. 370.
4. See § 386.

a water meadow, it was held to be no bar,[1] being merely the loose opinion of the auctioneer with reference to a matter which was patent to the buyers. And where the printed particulars of an auction of an advowson stated that a "voidance of this preference is likely to occur soon" and the auctioneer stated in explanation that the "living would be void upon the death of a person aged eighty-two," it was held no bar to specific performance that the incumbent of the living was not the person aged eighty-two but expected to take the living of the latter upon the latter's death. The court thought that the representation, tho perhaps naturally misunderstood by the defendant, was too vague and indefinite to have any legal effect. The fact that the plaintiff had offered to covenant that the incumbent would avoid the living upon the death of a person aged eighty-two was not mentioned by the court, tho it may have had some influence upon the decision.

On the other hand, if there is gross misrepresentation as to the value,[3] it may be a bar to specific performance especially if coupled with great hardship—as it usually will be; and this is true tho the misrepresentation be non-actionable at common law on the ground of puffing[4] or on the ground that the party making the representation made it innocently.[5] And in Clermont v. Tasburg[6] which was a suit for specific performance of an agreement to exchange lands, the misrepresentation by the plaintiff to the defendant that the defendant's tenants were willing to give up their interest in the defendant's land was held to be a bar to relief.[7]

1. Scott v. Hanson (1826) 1 Simons 13, 1 Ames Eq. Cas. 353.
2. Trower v. Newcome (1813) 3 Merivale, 1 Ames Eq. Cas. 352.
3. Brown v. Smith (1902) 89 N. W. 1097 (Iowa).
4. Wall v. Stubbs (1815) 1 Maddock 80, 1 Ames Eq. Cas. 362.
5. See Baskcomb v. Beckwith (1869) L. R. 8 Eq. Cas. 100.
6. (1819) 1 Jacob & Walker 112, 1 Ames Eq. Cas. 358.
7. In Kelly v. Railroad (1888) 74 Cal. 557, 16 Pac. 386, the fraudulent representation was held a bar to specific performance tho the plaintiff had suffered no damage thereby. That the defendant

§ 159. Non-disclosure or concealment by non-fiduciary.

At common law mere non-disclosure by one who is under no duty to speak,[1] is not actionable fraud and will afford no defense to an action for breach of contract, tho active concealment from one who was attempting to find out the truth might be actionable by or give a defense to the innocent party. In Shirley v. Stratton[2] where the plaintiff vendor had industriously concealed the existence on the land of a sea wall which cost £50 a year to keep in repair the court denied specific performance on that ground; it would seem that the court would have been justified even in awarding cancellation to the defendant on the ground that he had a common law defense. On the other hand, in Bowles v. Round[3] the mere non-disclosure by the plaintiff vendor that there was a foot path across the land was held to be no defense to specific performance, the defect being patent and no attempt to conceal being shown.

The non-disclosure may be of such a character as to give a defense to specific performance while affording no defense at common law. In Ellard v. Llandaff[4] the plaintiff had been negotiating with the defendant for a new lease for lives; the only surviving life in the old lease was that of one Ellard and his life expectancy was an important matter in determining the granting of a new lease. The plaintiff having heard of the serious illness of Ellard, immediately took steps, before the

was imprudent in acting upon the plaintiff's fraudulent representation does not prevent the latter from being a bar. Cox v. Middleton (1854) 2 Drew. 209.

1. This duty to speak may arise either from a fiduciary relation, express reliance or an undertaking to tell the whole truth; or when parties are not dealing on an equal footing.

2. (1785) 1 Brown Ch. Cas. 440, 1 Ames Eq. Cas. 362.

3. (1800) 5 Ves. 508, 1 Ames Eq. Cas. 361. See also Haywood v. Cope (1858) 25 Beav. 140 (defendant could see that the mine had been worked before and abandoned).

4. (1810) 1 Ball & Beatty 241, 1 Ames Eq. Cas. 363.

defendant should also hear of it, to close the contract for a new lease. The court refused to give specific performance, putting their decision on the ground of sharp practice. It is to be observed, however, that there was also the element of hard bargain and it is upon this ground, probably, that the later English decision of Turner v. Green[5] is to be reconciled with Ellard v. Llandaff. In Turner v. Green the suit was for specific performance of an agreement to compromise; the defense set up was that at the time the compromise agreement was entered into the plaintiff alone, but not the defendant, knew that in the action which had been brought by the plaintiff against the defendant the chief clerk after a hearing had given the opinion that the plaintiff's summons should be dismissed; no hard bargain appears because the opinion of the chief clerk was not final—it was merely one step in the litigation; whereas in Ellard v. Llandaff the illness of the *cestui que trust* was a strong determining element.

In Fothergill v. Phillips[6] the plaintiff having trespassed upon the defendant's farm below the surface and taken 2000 tons of coal, contracted to buy the farm, saying nothing of the trespass. Here the defendant may sue in trespass or probably in quasi contract for the taking of the coal whether the sale of the land goes through or not, because the cause of action would not pass with the land;[7] but the plaintiff's wrongfully obtained knowledge as to the quality and perhaps as to the quantity of the coal under the land was rightfully held to be a bar to specific performance.

5. (1895) L. R. 2 Ch. 205, 1 Ames Eq. Cas. 364.

6. (1871) L. R. 6 Ch. App. 770, 1 Ames Eq. Cas. 368.

7. The court seemed to assume that it would: "The proposal which he makes is not in reality a simple proposal for the purchase of the property; it involves a buying up of rights which the owner has acquired against him and of which the owner is not aware." Since the cause of action for taking the coal is obviously not an easement, profit or covenant running with the land, it is difficult to see how it would pass to any transferee.

In McManus v. City of Boston[8] the plaintiff, in anticipation that the city of Boston would want a particular piece of land for school building purposes, bought the land for $5700 and shortly afterwards contracted to sell it to the city for $9500. It was admitted that the price was not exorbitant[9] and the plaintiff not being a fiduciary, specific performance was decreed.

If the plaintiff is an expert and the defendant not, a failure to disclose may be fatal to the plaintiff's suit.[10] But even in such a case if the defendant's hardship is due to an increase in value of his land caused by the purchaser's pursuit of his own business specific performance should not be refused on the ground of concealment.[11]

Where the plaintiff has undertaken to tell the whole truth, the failure to fulfill the undertaking may amount to a deception and be a bar to specific performance.[12]

§ 160. Innocent third person injured by plaintiff's fraud.

In Kelly v. Central Pac. Railroad Co.[1] the defendant's land agent had addressed a circular to the public inviting settlement on its vacant lands and stating that settlers would generally be given preference of purchase at the regular price. One Menger, who

8. (1898) 171 Mass. 152, 50 N. E. 607, 1 Ames Eq. Cas. 420.

9. If, however, there had been a fraudulent representation this fact would not prevent the representation from being a bar. Kelly v. Railroad (1888) 74 Cal. 557, 16 Pac. 386.

10. Woolums v. Horsley (1892) 93 Ky. 582, 20 S. W. 781 (expert buyer conceals from ignorant farmer the mineral value of his land).

11. Standard Steel Car Co. v. Stamm (1904) 207 Pa. 419, 56 Atl. 954 (plaintiff sent an agent to procure an option on defendant's land; the agent concealed the name of the real vendee). See 17 Harv. Law Rev. 499.

12. See Aaron's Reefs v. Twiss (1896) H. of L. App. Cas. 273. See *post* § 383.

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1. (1888) 74 Cal. 557, 16 Pac. 386, 1 Ames Eq. Cas. 355.

was already occupying some of the land, who received the circular and some verbal announcements from the defendant, conveyed whatever rights he had to one Cole who moved on the land and made improvements relying upon the circular. The plaintiff, with knowledge of Cole's rights and expectations in the matter, falsely represented to the defendant's agent that he had settled on the land and procured from him a contract to purchase it which he now seeks specifically to enforce; Cole intervened and asked for the conveyance of the land to himself. The court below decreed that the land be conveyed to Cole and the plaintiff appeals. The upper court held that whether Cole was entitled to specific performance or not, the plaintiff was not, on the ground that he had not come into equity with clean hands, and even tho no injury would result to the vendor in giving specific performance to the plaintiff it was sufficient that injury would result to the third person, Cole. If Cole had had a contract with the defendant which complied with the Statute of Frauds or was taken out of the Statute of Frauds by part performance, Cole clearly would be entitled to specific performance against the defendant in exclusion of the plaintiff. If there was a contract but unenforcible because of the Statute of Frauds, it would seem that the plaintiff should not be allowed to complain if the defendant should prefer to carry out the prior unenforcible contract, unless the defendant at the time of his contract with the plaintiff knew that Cole was in occupation.[2] In the latter case or in case Cole had no contract with defendant but a mere expectancy of purchase, then the case must be rested on the ground expressed by the court, that of injury to a third person which would be caused by winking at the sharp practice of the plaintiff.[3]

2. In which case the contract with the plaintiff would be a repudiation of the oral contract with Cole.

3. See also Memphis Keeley Institute v. Keeley Co. (1907) 155 Fed. 964, where specific performance was denied to the plaintiff be-

VI. Mistake—sharp practice.

§ 161. Mistake as ground for reformation or rescission and as a defense to specific performance.

Where, due to a mistake in the expression of a written instrument it fails to express the true intention which both parties had, equity will correct or,—to use the more usual term,—reform the instrument so as to make it conform to this real intention. The subject of Reformation will be treated later.[1]

Like fraud, mistake may be the basis for equity declaring the contract rescinded on the ground that the mistake has prevented the making of a genuine contract tho the forms required by law may have been complied with. The most common examples are cases where there has been a mistake (1) as to the nature of the transaction, such as a deed of conveyance having been signed by the plaintiff thinking that it was a lease; (2) a mistake as to the identity of the object dealt with; (3) a mistake as to characteristics or quality of the subject matter which is so important as to go to the root of the transaction.[2]

When the mistake is not serious enough to justify a court of equity in declaring rescission, it may still be used as a defense to a suit for specific performance, especially when it has been caused by the plaintiff or when it is combined with sharp practice on the part of the plaintiff or when specific performance would result in great hardship to the defendant. As already pointed out in discussing fraud,[3] tho the plaintiff may theoretically recover the loss of the bargain at common law, rescission not being given, yet as a practical matter

cause its business had been built up by fraudulent misrepresentations to the public as to the ingredients in its remedies.

1. See *post* Chap. VI.
2. For a discussion of the subject of rescission see *post* Chap. VII.
3. See *ante* § 156.

juries will usually not give a verdict for the full amount under such circumstances.

§ 162. Mistake of the defendant caused innocently by the plaintiff.

If the defendant's mistake is caused intentionally by the plaintiff, this of course amounts to fraud and will usually be ground for rescission and is *a fortiori* a bar to specific performance. Where the mistake was caused innocently by the plaintiff it is a factor to be considered along with hardship on the defendant in determining whether to give specific performance. In Burkhalter v. Jones[1] the suit for specific performance was by the purchaser; the vendor wrote a letter to the purchaser who had been recently left a widow and was unacquainted with business, in which his offer to buy for $2000 was so worded that she thought it was an offer to buy at $2100. Specific performance was refused on the ground that altho there was a contract and hence no basis for rescission, equity should not give specific performance because the defendant's mistake was due to the plaintiff's misleading letter. Since the defendant had sold the premises to another for $2400, there would have been some hardship in giving specific performance.

A case somewhat similar in its facts is Swaisland v. Dearsley.[2] Defendant bought at an auction sale some property which was described as follows: "An undivided moiety in a valuable piece of freehold plantation ground, etc. . . let to Mr. Godfrey a yearly tenant. The apportioned rent of the lot is £16 per annum." The defendant thinking that the rental of the moiety was £16 bid £170 for the property. If the defendant had read the rest of the conditions of the sale he would have discovered that the rent of what he purchased was only £8 per annum. Specific performance was refused because

1. (1884) 32 Kan. 5, 3 Pac. 559, 1 Ames Eq. Cas. 378.
2. (1861) 29 Beav. 430, 1 Ames Eq. Cas. 376.

of the ambiguous way in which the lot had been described; the hardship on the defendant if specific performance had been decreed is quite evident. Even tho the mistake is that of a third party it may operate to prevent specific performance. In Twining v. Morice[3] the plaintiff had happened to meet one Blake just before an auction sale and asked Blake to bid for him. The other bidders at the auction sale thought that Blake was a puffer because he happened to be the solicitor for the vendors and therefore they did not bid. While refusing to give specific performance to the plaintiff partly because the plaintiff had innocently caused the mistake, the court refused to give rescission to the defendant, leaving the plaintiff to his remedy at law.

§ 163. Mistake coupled with sharp practice by plaintiff.

If the plaintiff, knowing that the defendant is laboring under a mistake, takes advantage of the mistake the defendant can resist specific performance and perhaps, in a clear case on the facts, get rescission. Such cases nearly always involve hardship on the defendant. In Mansfield v. Sherman[1] the defendant offered several lots for sale; due to the negligence of the engineer in marking the lots and prices on the plan, one lot worth $12000 was offered for $2500; there was no direct evidence to show that the plaintiff in accepting the offer knew of the error, but the circumstances tended to show that he probably did. Specific performance was refused, but no rescission was given to the defendant.

A very similar case was that of Webster v. Cecil;[2] in that case the defendant, due to an error in adding a column of figures, offered property for $1100 instead of $2100; the defendant had already refused to sell the property for $2000 to the plaintiff's agent. The court

3. (1788) 2 Brown's Ch. Cas. 326, 1 Ames Eq. Cas. 416.

1. (1899) 81 Me. 365, 17 Atl. 300, 1 Ames Eq. Cas. 385.

2. (1861) 30 Beav. 62, 1 Ames Eq. Cas. 382.

refused specific performance saying that the plaintiff might bring such action at law as he might be advised. Under such circumstances a jury would give a very small verdict to one who was engaged in such sharp practice. If defendant had asked for rescission and cancellation it would seem that it should have been granted, because it was quite clear that the plaintiff had snapped up the offer.

In Kelley v. York Cliffs Improvement Co.[3] the defendant company had been organized in 1892 to buy and sell lands; a by-law of the company allowed shareholders to buy land from the company with stock at par value. The company was not successful and the stock depreciated in value. In 1898, the plaintiff contracted to buy land of the company; the company thought it was selling for cash. The plaintiff bought up shares of stock at much less than par and tendered them in payment. No lots had ever been sold for or paid for in stock and no allusion was made to stock payment in the negotiations of the defendant company with the plaintiff. The sharp practice of the plaintiff, coupled with the great hardship on the defendant if specific performance were decreed were relied upon by the court in refusing specific performance unless the plaintiff would pay cash; the plaintiff was thus left to his remedy at law.[4]

§ 164. Non-negligent mistake coupled with great hardship.

Even where the mistake of the defendant has not been caused by the plaintiff and where he has not knowingly taken advantage of it, it may be ground for denying specific performance, where coupled with great

3. (1900) 94 Me. 374, 47 Atl. 898, 1 Ames Eq. Cas. 402.

4. In Joynes v. Statham (1746) 3 Atk. 388 the plaintiff who was asking for specific performance of an agreement to lease, had drawn up the agreement himself and omitted to stipulate that he should pay taxes; it appearing that the defendant could not read, specific performance was denied.

hardship, but rarely, if ever, a ground for rescission. In Mason v. Armitage[1] an auction was being held of the defendant's land; one Rising was to put in one bid for the defendant but by mistake expected to be called upon by name and was to bid £9000. The estate was sold for £8000 to the plaintiff. The plaintiff had told the defendant that he would not buy, the defendant telling the plaintiff that Rising was to make one bid for him. Specific performance was denied on the ground that altho the plaintiff had not caused the mistake or knowingly taken advantage of it, he had not only thrown the defendant off his guard but had led other bidders to believe that he was a bidder for the defendant.

Mason v. Armitage is followed in the later English case of Day v. Wells[2] in which there was no suggestion whatever of any unfair conduct on the part of the plaintiff. In that case the defendant having an auction sale of land, thought that the auctioneer would prevent the property from being sacrificed and thereupon refrained from having any one bid for him; the auctioneer understood that there was to be no reserve and allowed property worth $240 to be sold for $162.

In Malins v. Freeman[3] the defendant bid in the wrong lot at an auction, his mistake being due to his defective hearing. Specific performance was refused but the opinion of the court is far from satisfactory. If the decision is to be supported it must be on the ground of the hardship which would be entailed upon the purchaser to compel him to take property he did not want at any price; but the argument of the court is all based upon the ground of mistake. If the mistake had been a mutual mistake instead of the mistake of the defendant alone, the decision would have been unassailable. The fairly recent case of Van Praagh v.

1. (1806) 13 Ves. 25, 1 Ames Eq. Cas. 374.
2. (1861) 30 Beav. 220, 1 Ames Eq. Cas. 380.
3. (1837) 2 Keen 25, 1 Ames Eq. Cas. 383.

Everidge[4] which is very similar in facts, gave specific performance.

In Durham v. Legard,[5] the defendant in contracting to sell an estate containing 11,800 acres to the plaintiff represented that it contained 22,000 acres. The plaintiff sought specific performance with compensation testifying that he was influenced by size and not by rental; the defendant insisted that he had based his price on rental, not on size, and that the misrepresentation as to size was due to the mistake of his agent. Compensation for the deficiency was refused; it is quite likely, however, that the court would have refused specific performance without compensation if the defendant had asked for it.

In Higgins v. Butler[6] the defendant had agreed with the plaintiff to convey his interest in a piece of land worth $1200 for a horse worth $200, acting under the mistaken belief that she was not entitled to hold the land but she had only a claim against it. The court based its refusal to give specific performance upon the unsatisfactory state of the evidence. Assuming the substantial truth of the facts stated, the mistake of the defendant coupled with the great hardship on the part of a woman who was probably unacquainted with business dealings would seem to have been adequate ground for refusing relief.

§ 165. Whether defendant may set up negligent mistake.

The fact that a mistake has been made negligently is, by the great weight of authority, not important in the law of quasi contracts.[1] In specific performance,

4. (1902) 2 Ch. 266; see 16 Harv. Law Rev. 143.
5. (1865) 34 Beav. 611, 1 Ames Eq. Cas. 395.
6. (1886) 78 Me. 520, 7 Atl. 276, 1 Ames Eq. Cas. 419.

1. Woodward, Quasi Contracts § 15: "No matter how close at hand the means of knowledge may be, no matter how stupid or careless the failure to ascertain the truth may be, if one confers a benefit

however, it is usually taken into consideration along with other facts to determine whether the plaintiff should be given relief so that it might be sufficient to throw the scales against the defendant.[2] In Tamplin v. James,[3] the defendant bought, just after an auction, one of the pieces of land not sold at the auction. Upon being sued for specific performance the purchaser set up in defense that he supposed that one of the three garden plots was included in what he bought. The auction sale map showed that it was not so included. Specific performance was decreed against the buyer on the ground that he was negligent in making the mistake. The annual rental for the garden plot was 10s *per annum* so that the hardship upon the defendant was very slight.

In Sullivan v. Jennings[4] the first mortgagee who was not joined in a foreclosure suit instituted by the second mortgagee, bid in the property, acting under a mistake of law thinking that it was necessary to protect himself. To force him to take the property at the price bid would compel him to pay $4500 for property worth $3500. Specific performance was refused.[5] Here tho

under an honest mistake, i. e. in unconscious ignorance of the truth, the retention of the benefit is ordinarily inequitable."

2. This is a good illustration of the difference between the usual working of law and equity; at law negligence in making the mistake must either be or not be a bar to relief: there is no possible middle ground; in equity it merely influences the chancellor in the exercise of his discretion.

3. (1880) L. R. 15 Ch. Div. 215, 1 Ames Eq. Cas. 388. See also Western R. R. Corp'n v. Babcock (1843) 6 Metcalf 340: "He must show an honest mistake not imputable to his own gross negligence." And see Caldwell v. Depew (1889) 40 Minn. 528, 42 N. W. 479.

4. (1888) 44 N. J. Eq. 11, 14 Atl. 104, 1 Ames Eq. Cas. 393.

5. In Denny v. Hancock (1870) L. R. 6 Ch. App. 1, the failure of a purchaser at auction to examine minutely a plan of the property did not prevent him from successfully urging mistake as a bar to specific performance. In Wood v. Scaith (1855) 10 Jur. [N. S.] 1107 the defendant in making an offer by mail to lease carelessly omitted to say that he expected a premium of £ 500; specific performance was refused.

the defendant was negligent in making the mistake the hardship would be very great if he were compelled to perform.

§ 166. Mistake of law.

As a matter of principle no distinction should be drawn between mistake of law and mistake of fact and such seems to be the present tendency.[1] There is, of course, a perfectly sound doctrine that ignorance of the law does not excuse;[2] this properly applies to one who has committed a crime or tort or breach of contract, but it does not properly apply to one who has committed no wrong and therefore asks no excuse. The confusion has been brought about by stating the rule too broadly that every one is presumed to know the law; of course even as to those seeking an excuse such a statement is a fiction; but as to others it is not only a fiition but is conducive to unfortunate results.

The modern tendency in specific performance cases is shown by Twining v. Neil[3] in which the mistake of the purchaser as to the existence of a mortgage together with hardship prevented a decree for specific performance.[4]

1. For a discussion of mistake of law in reformation and rescission cases see *post* §§ 345, 346, 373, 374. As to mistake of law in quasi contracts see Woodward, Quasi Contracts §§ 35, 36. There has also been a tendency in the law of torts to hold that representations of law are not actionable; this holding also should be reversed.

2. The law could hardly be administered upon any other basis.

3. (1884) 38 N. J. Eq. 470. There is a tendency to regard mistake as to title as a mistake of fact. That law is a species of fact and that it is often very difficult to determine whether a particular mistake is one of fact or law is a still further objection to treating them differently.

4. See also Watson v. Marston (1853) 4 DeG., M. & G. 230, in which the defendant's mistake as to who was entitled to the surplus after the sale of mortgaged property, saved her from a decree of specific performance. The mistake was pretty clearly one of law. On the other hand, in Morley v. Clavering (1860) 29 Beav. 74, the court said that mistake of law was no defense.

§ 167. Ambiguity; surprise.

As already pointed out,[1] a court of equity may refuse specific performance on the ground that the contract is not certain enough in its terms to permit of specific execution tho it may be certain enough to allow an action at law.[2] On the other hand, where the terms of the contract are certain and clear and the parties have dealt on an equal footing, a court of equity will be disinclined to listen to a defendant who says he did not understand what was meant.

In Powell v. Smith,[3] the defendant made an agreement with the plaintiff to lease certain land to the latter, "lease to be for 7, 14, or—years from Sept. 29, 1870." After the plaintiff had gone into possession and had expended large sums in improving the farm, the defendant refused to give a lease unless the option of refusing a renewal were reserved to himself, as he erroneously understood the agreement to provide. The court in decreeing specific performance said that the defendant was bound by a fair construction of the contract and his misunderstanding of it was immaterial.[4]

But even if the terms of the contract are clear, if the defendant has acted without deliberation and under confused and sudden impressions, equity may refuse to give specific performance against him on the ground of surprise, especially if there is also much hardship.[5]

1. See *ante* § 41.

2. See also Baxendale v. Seale (1855) 19 Beav. 601; Neap v. Abbot (1838) 47 E. R. 531.

3. (1872) L. R. 14 Eq. 85, 1 Ames Eq. Cas. 391.

4. See also Morley v. Clavering (1860) 29 Beav. 84; Caldwell v. Depew (1889) 40 Minn. 528, 42 N. W. 479.

5. See Mathews v. Terwilliger (1848) 3 Barb. 50, 54, in which the defendant signed a written contract without noticing that it did not provide either for interest on the purchase money or for securing the principal.

VII. Hardship.

§ 168. Hardship of defendant as sole ground.

Tho hardship alone is never a ground for giving rescission it may be, if very serious, the sole basis for refusing specific performance. In Wedgewood v. Adams,[1] the defendants, who were trustees, contracted to convey some land to the plaintiff free from incumbrance. To enforce the contract specifically against the defendants would make them personally liable for the incumbrance if the purchase money were not enough to satisfy them. Because of the great hardship on the trustees specific performance was denied, the court citing as authority the decision of Lord Hardwicke in Faine v. Brown;[2] in that case the defendant had been devised an estate by his father, upon the condition that if he aliened it in twenty-five years, one-half the purchase money should go to his brother; the court said that the hardship of losing half the purchase money was a sufficient reason for refusing specific performance.[3]

In Willard v. Tayloe[4] the defendant had in 1854 leased to the plaintiff for ten years with an option to buy. At that time gold and silver were the ordinary money of the country. In 1862, Congress made greenbacks legal tender. The plaintiff exercised his option

1. (1843) 6 Beav. 600, 1 Ames Eq. Cas. 400.

2. (1750) 2 Ves. Sr. 307 (cited), 1 Ames Eq. Cas. 397.

3. In several cases equity has refused to give specific performance where it would result indirectly in a forfeiture by the defendant. Peacock v. Penson (1848) 11 Beav. 355; 16 Col. Law Rev. 410-412. In Helling v. Lumley (1858) 3 DeG. & J. 493 it was not clear whether giving specific performance of a contract for an opera seat would subject the defendant to a forfeiture of his lease but the court said it would be no defense since it would be due to the defendant's own act after the contract. If this is to be reconciled with Faine v. Brown it must be on the ground that in Faine v. Brown there was in addition to hardship some other element which does not appear.

4. (1869) 8 Wall 557, 1 Ames Eq. Cas. 404.

by acceptance and then sought specific performance, tendering greenbacks in payment. The court refused specific performance unless he paid in gold, the greenbacks being worth at that time only a little over one-half par, so that the hardship on the defendant would have been very severe.

In Friend v. Lamb,[5] the defendant, a married woman with small resources made a foolish and improvident contract to buy land for $50,000, she agreeing to pay only $5000 down and agreeing to pay the rest in installments covering seven years. On account of the great hardship which would almost certainly result to the defendant, the court refused specific performance.

In Clarke v. Rochester, etc., R. R. Co.[6] specific performance was sought, not of a contract but of a statutory obligation imposed upon the defendant, to erect and maintain fences on the sides of their road and farm crossings for the use of proprietors of lands adjoining. The plaintiff owned two parcels of a small village lot which had been divided by the railroad right of way and was of small value; the cost of making a farm crossing would have been very great on account of a fifteen foot embankment. As a matter of the balance of convenience specific performance was therefore refused.[7]

§ 169. Hardship on others than defendant.

In some cases the fact that the giving of specific

5. (1893) 152 Pa. 529, 1 Ames Eq. Cas. 408.

6. (1854) 18 Barb. 350, 1 Ames Eq. Cas. 410.

7. See 9 Col. Law Rev. 68-70 for an argument that the real basis of the hardship cases is inequality of the position of the parties due either (1) to the defendant's mental inferiority; (2) to the fact that the defendant's means of knowledge of the subject matter were inferior in important respects to the plaintiff's; or (3) to events or discoveries unforseen to either party at the date of the contract which have rendered it unequal. It is rather difficult, however, to explain all the cases in this and the following sections on such a basis. See also 16 Col. Law Rev. 410 for a modified restatement.

performance against the defendant would work a hardship on persons other than the defendant has been an element in refusing specific performance. In Conger v. N. Y., etc., R. R. Co.,[1] the defendant railroad company agreed with the plaintiff to erect a station at a particular place and to stop five express trains each way daily. In refusing specific performance of the contract the court rested its decision upon the slight benefit to the plaintiff, the great expense to the defendant and the inconvenience to public travel, the community being only sparsely settled and the place for the station being at a sharp curve, with steep grades in both directions. In such a case, unless the plaintiff sues at law and thus extinguishes the contract, it might be possible for him later to get specific performance, e. g., if a great business boom should come to the community so that the benefit to the plaintiff would be greater and the inconvenience to the defendant and the public[2] would be less.

In Curran v. Holyoke Water Co.[3] after the defendant had contracted to convey a city lot to the plaintiff, the street line was changed ten feet so that performance by the defendant would interfere with the width of the street, and with the lines of another street, thus injuring the owners of other lots in the vicinity; the dedendant was willing to compensate the plaintiff for the ten feet. Specific performance was refused as to the whole lot on account of the great hardship to innocent third parties.

§ 170. Hardship foreseen as a risk no defense.

Altho the mere fact that the hardship is produced by later events does not prevent its being a bar, yet if

1. (1890) 120 N. Y. 29, 1 Ames Eq. Cas. 412. For a very similar case see Goding v. Bangor & A. R. Co. (1901) 94 Me. 542, 48 Atl. 114.

2. As to public convenience being an element in refusing an injunction in non-contractual law see 28 Harv. Law Rev. 110.

3. (1874) 116 Mass. 90, 1 Ames Eq. Cas. 414.

the parties contracted with reference to the possible hardships, it will have no influence upon the court in determining whether to give specific performance. In Adams v. Weare[1] the defendant had contracted to buy an estate of the plaintiff and the plaintiff asks specific performance. The defense set up was that the defendant had agreed to give nearly double the value because he expected to get the consent of a third party to the building of a mill on the premises and he had been unable to procure such consent. Specific performance was decreed on the ground that the defendant went into the transaction with his eyes open.[2]

VIII. Intoxication.

§ 171. Effect of intoxication of defendant at time of making contract.

Where the paintiff has procured the defendant to be intoxicated in order to take advantage of him in making a contract a court of equity will usually give rescission on the ground that such conduct amounts to fraud. Where the plaintiff has not procured the intoxication but deliberately takes advantage of it, the case is almost as strong.[1] But the mere fact of intoxication is in

1. (1890) 1 Brown Ch. Cas. 567, 1 Ames Eq. Cas. 397. A mere decline in value of the property contracted to be purchased by the defendant is no bar. Lee v. Kirby (1870) 104 Mass. 420. As to accidental loss happening after the date of the contract see *ante* §§ 118, 119. In most jurisdictions this is no defense.

2. Where the transaction is obviously speculative the mere fact that it turns out badly for the defendant is not a bar to specific performance. Haywood v. Cope (1858) 25 Beav. 140 (mine lease); Southern Ry. Co. v. Franklin & P. R. Co. (1899) 96 Va. 693, 32 S. E. 485 (railroad lease); Chubb v. Peckham (1860) 13 N. J Eq. 207 (agreement to support); Howe v. Watson (1901) 179 Mass. 30, 60 N. E. 415, 1 Ames Eq. Cas. 429 (agreement to support). See also 11 Mich. Law Rev. 147-150.

1. See Moetzel & Muttera v. Kock (1904) 122 Iowa 196, 97 N. W. 1079.

itself no ground for rescission, tho it alone has been held a complete bar to affirmative relief.[2] In practically all such cases where the defendant resists specific performance, more or less hardship would result if specific performance were decreed. If the contract were advantageous to him he would usually have performed.[3]

IX. Lack of mutuality.

§ 172. Mutuality as a basis for giving relief.

There are two doctrines, each of which is commonly referred to as the doctrine of mutuality, which should be carefully distinguished; for the sake of brevity and convenience one will be referred to as the doctrine of mutuality and the other as the doctrine of lack of mutuality. Tho they are sometimes so stated as to be destructive of each other, each has its separate place and function.

The doctrine of mutuality has apparently been invoked only in favor of vendors against purchasers,[1] and in only two classes of cases. If the subject matter of the contract is such that damages would be inadequate to the purchaser, so that he would ordinarily have obtained specific performance if he had sued for it, the vendor may have specific performance; that is, if the buyer's common law remedy would have been inadequate, the court will not inquire into the adequacy of the seller's common law remedy.[2] The other application is that of the rule of part performance as taking a case out of the operation of the Statute of Frauds; if a pur-

2. Cragg v. Holme (1811) 18 Ves. 14 n. (12), 1 Ames Eq. Cas. 417.

3. Of course, it is assumed here that the defendant was not so intoxicated as not to have a contracting mind; if he were in such a condition he could ask for a decree of rescission on the ground of no contract.

1. Or in favor of lessors against lessees.

2. See *ante* § 48.

chaser is held to have sufficiently part performed by the taking of possession so that he would have escaped the bar of the statute if he had sued for specific performance, the vendor may likewise take advantage of such part performance.[3]

§ 173. Lack of mutuality as a basis for denying relief. I. Lack of mutuality of obligation.

The phrase "lack of mutuality" may mean either "lack of mutuality of obligation" or "lack of mutuality of remedy." Again, the phrase "lack of mutuality of obligation" may mean either of two things. It may mean that the contract is unequal in its terms or unfair to the defendant and that to give specific performance would result in great hardship to him;[1] it may, however, mean that the contract or supposed contract was not binding upon both parties. If the contract was a unilateral contract, i. e., one in which an act or forbearance on one side was exchanged for a promise on the other, the former party is never bound and it was not intended that he should be, because no contract arises until he has fully performed the act or forbearance to be exchanged. Where he has thus fully per formed, and a contract has come into existence, it would seem absurd to allow the defendant to set up in defense that the plaintiff was never bound to perform.[2] If the parties had meant to enter into a bilateral contract, i. e. an exchange of a promise for a promise, but for some reason or other one of the parties

3. See *ante* § 132.

1. See Rust v. Conrad (1882) 47 Mich. 449, 11 N. W. 265. 1 Ames Eq. Cas. 435; 14 Col. Law Rev. 686; 9 Col. Law Rev. 542; 16 Col. Law Rev. 461. The subject of hardship has already been discussed; see *ante* § 168.

2. See 16 Col. Law Rev. 448. In Cortelyou v. Barnsdall (1908) 236 Ill. 138, 86 N. E. 200, the court not only refused specific performance of a unilateral contract because of lack of mutuality of obligation, but actually cancelled it. See 2 Ill. Law Rev. 402, 403.

is not bound thereby, there is no contract at all because by the common law of bilateral contracts both parties must be bound or neither is bound. There would seem to be no necessity for applying such an imposing phrase as lack of mutuality to such a situation; it is much simpler to say that there is no contract at all.

§ 174. II. Lack of mutuality of remedy.

The more usual meaning of the phrase "lack of mutuality" is lack of mutuality of remedy. This doctrine seems to have been formulated first by Fry as follows:[1] "A contract to be specifically enforced by the court must be mutual, that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other of them. When, therefore, whether from personal incapacity, the nature of the contract or any other cause the contract is incapable of being enforced against one party, that party is equally incapable of enforcing it against the other, tho its execution in the latter way might in itself be free from the difficulty attending its execution in the former." If this rule were literally followed, it is obvious that it would not only obliterate the doctrine of mutuality as a basis for giving specific performance,[2] but it would also deprive purchasers of specific performance in all cases where the remedy at law would be adequate for the vendors. Hence the phrase in the rule "or any other cause" and therefore the rule itself must be understood as not applying to the question of adequacy of damages;[3] that question, as we have seen, is governed by the doctrine of mutuality as a basis for *giving* specific performance.

In a recent edition of Pomeroy on Equity[4] the doctrine has been stated as follows: "If at the time of

1. Fry, Specific Performance, 5th Ed., § 461.
2. See *ante* § 172.
3. Or to the question of part performance as taking cases out of the operation of the Statute of Frauds. See *ante* § 132.
4. See 6 Pomeroy, Equity Jurisprudence, 3rd Ed., § 769.

filing the bill in equity, the contract being yet executory on both sides, the defendant, himself free from fraud or other personal bar, could not have the remedy of specific performance against the plaintiff, then the contract is so lacking in mutuality that equity will not compel the defendant to perform but will leave the plaintiff to his remedy at law."

In the following sections the exceptions to the rules as laid down by Fry and Pomeroy will be discussed.

§ 175. 1. Plaintiff has defense of Statute of Frauds.— 2. Plaintiff an infant at time of contract.

1. It is no bar to specific performance that only the defendant signed the memorandum of contract and hence that the plaintiff might have pleaded the Statute of Frauds, if he had been sued for specific performance.[1] Here there was mutuality of obligation in all jurisdisdiction in which failure to comply with the Statute of Frauds does not render the contract void but merely unenforcible;[2] there was no mutuality of remedy at the time of filing the bill tho there was the moment after such filing in those jurisdictions which regard the filing of the bill for specific performance as satisfying the Statute of Frauds.[3] Hence this is an exception even to Pomeroy's restatement of the rule unless it be still further amended so as to read: "If at the moment *after* the filing of the bill in equity, etc."

2. It is no bar to specific performance that the plaintiff was an infant at the time of making the contract, if at the time of filing suit he is of age and therefore capable of affirmance.[4] The situation here is very similar to the case just discussed of the Statute of

1. Hatton v. Gray (1864) 2 Cases in Ch. 164, 1 Ames Eq. Cas. 421; see 3 Col. Law Rev. 5.

2. In a few jurisdictions the failure to comply with the statute renders the contract void; in those jurisdictions the contract is apparently void for all purposes.

3. See Carskaddon v. Kennedy (1885) 40 N. J. Eq. 259.

4. Clayton v. Ashdown (1714) 9 Viner's Abridg't 393 (G. 4) pl. 2, 1 Ames Eq. Cas. 421.

Frauds. There was mutuality of obligation because an infant's contracts are not void but merely not enforcible against him if he chooses to set up infancy as a defense. There was no mutuality of remedy at the time the contract was made or at the time the bill was filed tho there probably was the moment after the bill was filed, because the filing of the bill probably was such an affirmance that if he had dismissed the suit, the other party could have obtained specific performance against him. If the plaintiff had filed the bill and the question had come up for decision before he became of age specific performance would have been refused;[5] but if the question had not come up for decision until after he became of age, there would seem to be no good reason why specific performance should not be given. This last would be an exception even to the suggested amendment of Pomeroys's statement.

§ 176. 3. Contract with a fiduciary—4. Contract procured by fraud.—5. Contract with one who conveys property in fraud of creditors.

(3). Where a fiduciary to sell has attempted to buy for himself, he cannot get specific performance of the contract no matter how fair it is, the privilege of avoiding it being given to the other party in order to insure his protection; yet the latter may get specific performance against the former.[1]

(4). Similarly, one who has procured a contract by fraud is unable to get specific performance tho of course he cannot set up his own fraud in defense if he is sued by the other party.[2]

(5). And one who before contracting with the plaintiff has made a voluntary settlement of his property in fraud of creditors, cannot get specific performance

5. Flight v. Bolland (1828) 4 Russell 299, 1 Ames Eq. Cas. 422; 3 Col. Law Rev. 1, 5.

1. See 3 Col. Law Rev. 1, 4.
2. See 3 Col. Law Rev. 1, 4.

against the purchaser because he cannot attack his own settlement; but he cannot resist a bill for specific performance by the purchaser on this ground.[3] These are exceptions to the statement made by Fry but not to the restatement of the doctrine made by Pomeroy; the latter providing for these cases by the stipulation "the defendant himself free from fraud or other personal bar."

§ 177. 6. Complete performance by plaintiff.

Where the plaintiff has fully performed his part of the contract, he may get specific performance tho he could not have been compelled to perform. This is true whether the contract is unilateral or bilateral; in the former case, of course, there is no contract till such performance by the plaintiff. In Howe v. Watson[1] the decedent had promised her sister, the plaintiff, to give all her property, including some land, to her if she would come and stay with the decedent during the rest of her life. The plaintiff accepted the offer, removing from Florida; the decedent lived, however, only thirty-eight hours after the plaintiff's arrival. The court gave specific performance,[2] saying it was an exception to the doctrine of lack of mutuality. It does not appear whether the offer made by the decedent was for a unilateral or for a bilateral contract. If it were for a bilateral contract and therefore accepted by the plaintiff's letter saying she would come, specific performance could not have been had against her because it involved personal services. If it were for a unilateral contract, to be

3. Smith v. Garland (1817) 2 Merivale 123, 1 Ames Eq. Cas. 440.

1. (1901) 179 Mass. 30, 60 N. E. 415, 1 Ames Eq. Cas. 429.

2. See also Lane v. Hardware Co. (1898) 121 Ala. 296, 25 So. 809 (contract to build a house); Thurber v. Meves (1897) 119 Cal. 35, 50 Pac. 1063, 51 Pac. 536 (contract for personal services); Moayon v. Moayon (1903) 114 Ky. 855, 72 S. W. 33, (contract to become reconciled and live with the defendant, her husband). See 3 Col. Law Rev. 357.

accepted by completely performing the services, the plaintiff was of course never bound at all to perform, since she made no promise.

The restatement of the rule by Pomeroy provides for this class of cases by the phrase "the contract being still executory," so that it is not an exception to the rule as so stated tho it is of course an exception to the rule as formulated by Fry.

§ 178. 7. Options.

Where the plaintiff has made a contract with the defendant which gives the plaintiff an option for a certain time to buy[1] at a certain price the fact that before exercising the option the plaintiff could not have been compelled to buy,—in fact, was under no common law obligation to buy,—is no bar to specific performance.[2] And the fact that the option was under seal without consideration is no bar to relief[3] because tho the plaintiff paid nothing for the option, he must pay for the property if he gets it, so that substantially he is not a volunteer. This is not an exception to the rule as restated by Pomeroy, because at the time of filing the bill the plaintiff must have exercised his option and therefore is himself liable for specific performance. It is, however, an exception to the rule as stated by Fry unless "contract" is construed to mean not the contract of option but the bilateral contract which comes into existence the moment the option is exercised by acceptance.

1. Similar reasoning applies to options to sell; Watts v. Kellar (1893) 56 Fed. 1.

2. McCormick v. Stephany (1898) 57 N. J. Eq. 257, 41 Atl. 840, 1 Ames Eq. Cas. 431. But see *ante* § 173, note 2.

3. Borel v. Mead (1884) 3 N. M. 84, 2 Pac. 222, 1 Ames Eq. Cas. 434. And this is true even tho the defendant attempts to revoke the option before acceptance; O'Brien v. Boland (1896) 166 Mass. 481, 44 N. E. 602, 1 Ames Eq. Cas. 433. Whatever the correct theoretical reason therefor, an option under seal or based upon consideration is deemed to be irrevocable. See 13 Col. Law Rev. 738. The practical

In Rust v. Conrad,[4] the plaintiffs sought specific performance of an option contract to give a lease of a mine, the option contract giving the plaintiffs (lessees) the privilege of terminating the lease on thirty days' notice. Specific performance was refused because of the privilege of putting an end to the lease, on the ground that the plaintiff might easily nullify the action of the court. However, the plaintiff cannot immediately render the decree nugatory but only at the end of at least thirty days; it is therefore, not like the case where an infant is denied specific performance while he is still an infant, because he can render the decree nugatory at once. The decision of Rust v. Conrad has been criticised[5] and the leading American case now is *contra* to it.[6]

§ 179. 8. Failure of vendor to get title.—9. Contract with wife and husband.

(8). Where at the time the contract was made the vendor did not have good title but later procures it

convenience of holding option contracts to be irrevocable is obvious; Watts v. Kellar (1893) 56 Fed. 1.

4. (1882) 47 Mich. 449, 11 N. W. 265, 1 Ames Eq. Cas. 435.

5. See 16 Harv. Law Rev. 72, 55 Cent. Law J. 64. And the legislature of Michigan changed the rule by a statute giving the holder of an option for a mine lease the right to specific performance; Grummett v. Gingrass (1889) 77 Mich. 369, 388, 43 N. W. 999.

6. Philadelphia Ball Club v. Lajoie (1902) 202 Pa. 210, 51 Atl. 973. In that case Lajoie contracted with the baseball club to play the whole season but the contract provided that the club should have the power to terminate the agreement on ten days notice; the club sought to obtain an injunction against Lajoie's playing for another ball club and succeeded. In order to have sufficient mutuality of obligation to have a valid bilateral contract it is not necessary that both parties be bound for the same length of time any more than that they must be bound to do the same things, but no doubt each must be bound for an appreciable time; if the club could have discharged Lajoie upon an hour's notice, it is doubtful whether this would be considered as a contract. If, however, the obligation imposed by the contract upon the defendant is very much heavier than that imposed upon the plaintiff specific performance may be denied on the ground of hardship. See *ante* § 168.

before the purchaser learns of the defect or before he repudiates the contract the vendor may by the weight of authority obtain specific performance against the purchaser.[1] This is obviously an exception to the rule as stated by Fry but not to Pomeroy's restatement, because at the time of filing suit the purchaser would be able to get specific performance against the vendor. There are a few cases denying relief, on the mechanical ground of lack of mutuality.[2]

(9). A somewhat similar case is that of Fennely v. Anderson.[3] In that case the defendant had contracted to buy some land from some married women the contract having been signed by their husbands also. The defense set up to a bill for specific performance was that the married women could not have been compelled to convey since as to them the contract was not only unenforcible, but void. The court gave specific performance, however, remarking that it was one of the exceptions to the doctrine of lack of mutuality of remedy.

It is to be observed here that this case is an exception even to the rule as restated by Pomeroy, and to its suggested amendments since the filing of the bill would not bind the married women to the contract.[4]

§ 180. 10. Lumley v. Wagner.

(10). As already explained,[1] the injunction in Lumley v. Wagner was given against Miss Wagner's

1. Dresdel v. Jordan (1870) 104 Mass. 407, 3 Col. Law Rev. 1, 7, note 3.

2. Norris v. Fox (1891) 45 Fed. 406, 1 Ames Eq. Cas. 426 and cases cited in note.

3. (1851) 1 Ir. Ch. 706, 1 Ames Eq. Cas. 423. See also Logan v. Bull (1880) 78 Ky. 607, where the contract was made with the husband but the title was in the wife; she being willing to convey, specific performance was decreed against the purchaser.

4. Tho there might have been a validation of the contract under statute 4 and 5 Wm. IV. v. 92, the filing of the bill would apparently not satisfy the statute.

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1. See *ante* §§ 73, 78.

singing at other theaters in spite of the fact that Miss Wagner could not have obtained affirmative performance from Lumley; however, since in converse circumstances[2] she might perhaps have obtained an injunction against Lumey's hiring another in her place, it is fair to say that there was mutuality of remedy. If, however, she could not have obtained such negative relief, then the decision is an exception to all of the suggested forms of the rule, because even after the decree she would be no better entitled to an injunction than she would at any earlier time.

The decisions which are inconsistent with the case of Lumley v. Wagner are usually placed on the ground of lack of mutuality of remedy. In Hills v. Croll,[3] the defendant had agreed to buy from the plaintiff all the acids he should require for the manufacture of sulfate of ammonia and to sell to the plaintiff all the sulfate of ammonia which he might manufacture, the plaintiff promising to supply the acids and the defendant promising to buy from no one else. Later the defendant began buying acids from others; the court refused to enjoin this on the ground that it could not compel the plaintiff to furnish all the acids the defendant might need. If the acids were unique or difficult to procure, the court probably would be willing to give such relief to the defendant if he had sued; but if the acids were easily procurable elsewhere the case is sound, on the simple ground of the adequacy of the common law remedy.

§ 181. III. Lack of mutuality of performance.

The doctrine of lack of mutuality of remedy, no matter how stated, is at best artificial and mechanical. The substantial principle really involved in this class of cases is that which underlies the modern common law doctrine of so called conditions implied in law. That

2. See *ante* § 78.
3. (1845) 2 Phillips 60, 1 Ames Eq. Cas. 427.

principle is briefly and roughly this: a defendant should not be held liable at common law in an action for damages or in equity compelled specifically to perform his promise unless in the former case the defendant had an opportunity of getting the plaintiff's performance for which he had bargained or in the second case, unless equity is able to give such performance to the defendant either at the time of the decree or later.[1] If it be desired to retain the word mutuality this well settled principle may be called the doctrine of the lack of mutuality of performance.[2] Altho the decisions show ten classes of cases that are exceptions to the doctrine of lack of mutuality of remedy as stated by Fry and at least four[3] to the doctrine as restated by Pomeroy, there is no class of cases in which the weight of authority is not entirely consistent with the principle of lack of mutuality of performance. In (1), (2), (3), (4), (5), (7), (8), (9), *ante,* the ordinary conditional decree protects the defendant by providing for simultaneous performance by the plaintiff and the defendant; in (6), where the plaintiff has already fully performed, such protection is obviously unnecessary; while in (10) the defendant who is willing to work for the plaintiff after the injunction is granted may have the injunction dissolved if the plaintiff should later default in his performance.[4]

1. The first formulation of this was by Professor Ames, 3 Col. Law Rev. 1, 12: "Equity will not compel specific performance by a defendant, if after performance the common law remedy of damages would be his sole security for the performance of the plaintiff's side of the agreement." See also 23 Harv. Law Rev. 294.

2. This phrase is suggested in 3 Ill. Law Rev. 608, 612.

3. Namely the (1), (2), (9), and (10) *ante.*

4. See *ante* § 78.

CHAPTER III.

Specific Reparation and Prevention of Torts.

A. In General.

§ 182. Analogy of torts to contracts.

The general attitude of courts of equity toward reparation and prevention of torts is similar to their attitude toward enforcing performance of contracts; relief is given only where the remedy at law is inadequate and where the balance of convenience is not against giving the relief. In the exercise of its jurisdiction over trespass, however, history has played a large part. Specific reparation of torts is analogous to the specific performance of affirmative promises while prevention of torts is analogous to the specific performance of negative promises.

B. Waste.

§ 183. Common law definition of waste.

At common law waste consisted of any act done by one who was rightfully in possession of land but who possessed an estate less than an estate of inheritance, which resulted in injury to the inheritance or in such a change of the appearance of the land that it would be difficult to identify it.[1] Thus a change of meadow land into arable land or *vice versa* was considered waste[2] for this reason, and so was the putting up of new

1. Tiffany, Real Property § 243.
2. Simmons v. Norton (1831) 7 Bing. 640.

houses.[3] But with improved methods of identifying lands, and in this country with the adoption of the registry system such changes are not in themselves waste[4] unless they also injure the inheritance.[5]

The definition of waste just given confines it to acts done, but it might also consist of omissions, in which cases it was called permissive as distinguished from active or voluntary waste. In England apparently a tenant for years was liable at common law for permissive waste but not a tenant for life;[6] but in this country both are liable.[7] Permissive waste consists in failing to use due care to prevent injury to the land and building by fire, water, etc.; by the modern view the tenant is not liable for accidental injury, or for the unauthorized act of a stranger.[8]

Where the act of the tenant resulted in an increase of value of the property it was usually called ameliora-

3. Where the new buildings may be removed at the end of the term without much inconvenience, leaving the property in the same situation as it was at the beginning of the tenancy it is not now considered to be waste; Winship v. Pitts (1832) 3 Paige 259.

4. Pynchon v. Stearns (1846) 11 Metc. 304; 14 Harv. Law Rev. 226. See Tiffany, Real Property § 243: "The general tendency of the American courts has been to restrict the application of the English law of waste, in order to adapt it to the conditions of a new and growing country and to stimulate the development of the land by the tenant in possession."

5. But one entitled to the inheritance is not barred from objecting merely because changes made will increase the value of the land where, for example, the entire character of a building is altered. Smyth v. Carter (1853) 18 Beav. 78; Tiffany, Real Property § 251. See also Charity Board v. Waterworks Co. (1900) 1 Ch. 624 (putting rubbish on the land which impaired its value for building purposes tho it may have enriched the soil)

6. But there seems to be some doubt. Tiffany, Real Property § 254; 13 Harv. Law Rev. 151.

7. Moore v. Townshend (1869) 33 N. J. Law 284; Stevens v. Rose (1888) 69 Mich. 259. But a tenant at will has never been held liable for permissive waste. Tiffany, Real Property § 254.

8. The rule was formerly *contra*, see 15 Col. Law Rev. 253; 28 Harv. Law Rev. 637; Tiffany, Real Property § 254.

ting waste[9] to distinguish it from destructive waste which resulted in reducing the value of the inheritance.

§ 184. Common law and statutory actions for waste.

By the early common law only tenants who were in by act of law, such as tenants in dower or by curtesy were liable for waste; tenants who were in by act of the parties, such as tenants for life or for years were not so liable on the ground that the lessor could have protected himself by a specific provision in the lease.[1] In 1267, however, the Statute of Marlbridge[2] was passed making lessees liable for full damage; and in 1278 the stringent Statute of Gloucester[3] provided that the person committing waste should forfeit his interest in the land and should pay besides "thrice so much as the waste shall be taxed at." Whether these statutes are a part of the common law of this country seems to be a disputed question.[4] Where they are not in force an action on the case in the nature of waste[5] will lie for the actual damage done so that the question is important practically only because of the provision in the Statute of Gloucester for forfeiture and treble damages. The forfeiture provision of the Statute has not been favored by the courts.[6]

The common law action of waste could be brought only by one who had an immediate estate of inheritance.[7] Hence, if land be conveyed to A for life, B for

9. See 14 Harv. Law Rev. 226.

1. Co. Litt. 54; Tiffany, Real Property § 255. This statement which has come down from Lord Coke has been challenged by Professor Kirchwey in 8 Col. Law Rev. 425-437.

2. 52 Hen. III. c. 23 § 2.

3. 6 Edw. 1, c. 5.

4. Tiffany, Real Property § 255; 22 Harv. Law Rev. 149. In some states there are express statutes giving an action for waste. 1 Stimson's Am. St. Law § 1332, § 1343.

5. See Thackeray v. Eldigan (1899) 21 R. I. 481, 44 Atl. 689.

6. Williard v. Williard (1867) 56 Pa. St. 119, 129.

7. Co. Litt. 53b, 218b. Butler's note, 1 Ames Eq. Cas. 467 note. This was apparently because it would have involved a three sided suit.

life, C in fee, neither B nor C could bring the common law action of waste against A during B's lifetime. The defect being only procedural, C could bring the action after B's death if B should predecease A.[8] An action on the case was allowed, however, to any one whose estate was injured by the acts of waste.[9] Hence either B or C or both of them might have had an action on the case for the damages sustained.[10]

§ 185. Equitable remedies for common law waste.

At common law the only relief which the plaintiff could get, whether he brought the old common law action of waste or an action on the case, was money damages for injuries already inflicted. A court of equity by its power to issue a command to a defendant, is able to prevent the injury and will do so where the injury threatened is so serious that the common law remedy is inadequate. And an injunction will issue whether the appropriate remedy at law would have been an action of waste or an action on the case[1] or if no action at all

See *ante* § 5. For a discussion of the additional requirement of privity see Tiffany, Real Property § 255.

8. Perrot's Case (1599) Moore 368, 387, 1 Ames Eq. Cas. 467 note.

9. Green v. Cole (1682) 2 Saund. 253 note. And see Tiffany, Real Property § 255.

10. When the tenant was held liable in waste for unauthorized destructive acts committed by a stranger he was of course entitled to recover from the stranger in an action of trespass, not only for the damage alone to his own interest in the property but also for the damage to the estates in remainder or reversion. And even now, when he is no longer liable for such unauthorized acts, he is still allowed to recover the full amount, being liable over for the excess. This is justified on the score of procedural convenience in anology to a recovery by a bailee against a third person. See 15 Col. Law Rev. 253; 28 Harv. Law Rev. 637.

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1. See Whitfield v. Bewit (1724) 2 Peere Wms. 240, 1 Ames Eq. Cas. 460; Anonymous (1599) Moore 554, pl. 748, 1 Ames Eq. Cas. 467 (plaintiff did not have the immediate estate of inheritance).

would have lain.[2] On the other hand, an injunction will not be given if the injury threatened is merely trivial and could be compensated in damages and *a fortiori* where the waste is ameliorating.[3] In Doherty v. Allman[4] leases for 999 and 988 years respectively had been granted of store buildings. Some fifty years thereafter the neighborhood ceased to be a business neighborhood and the lessee was about to change the buildings so that they could be occupied as dwellings. An injunction against such changes was refused on the ground that since the store buildings were no longer worth anything the changes were, if waste at all, ameliorating waste.

As to permissive waste, the decree sought for would obviously be an affirmative one; since this would involve the difficulties of supervision[5] it would require

2. It is not clear in all jurisdictions that there is an action on the case, but this would not deter equity from giving an injunction; 1 Ames Eq. Cas. 468 note. Furthermore, equity has interfered by injunction to protect interests of much less magnitude than estates in fee or for life. Thus it has protected a wife's inchoate dower; Rumsey v. Sullivan (1915) 150 N. Y. Supp. 287, 28 Harv. Law Rev. 615; an *interesse termini*, Evans v. Prince's Bay Oyster Co. (1915) 154 N. Y. Supp. 279, 29 Harv. Law Rev. 101; and contingent future interests, 4 Ill. Law Rev. 428. The fact that the interest to be protected is that of an unborn infant is no bar to relief. Lutterel's Case (1670) Precedents in Ch. 50 (cited) 1 Ames Eq. Cas. 468. That the incoming tenant may restrain an outgoing tenant from removing fixtures (radiators, etc.) see Palmer v. Young (1903) 108 Ill. App. 252. And a landlord may get an injunction against waste by a sub-tenant tho there is no privity of estate or contract; Peer v. Wadsworth (1904) 67 N. J. Eq. 191, 58 Atl. 379.

3. Mollineaux v. Powell (1730) 3 Peere Wms. 268 n. (F), 1 Ames Eq. Cas. 468. It was suggested in that case that the remainderman in fee should always be made a party because he might approve of the waste; but even if he should approve of it, this ought to be no bar to the holder of the intermediate estate getting an injunction; the latter's rights ought not to depend in any way upon the consent of the holder of the fee.

4. (1878) L. R. 3 App. Cas. 709, 1 Ames Eq. Cas. 462; 14 Harv. Law Rev. 226.

5. As to the difficulty of supervision in cases of specific performance of contracts see *ante* § 62.

a relatively serious injury to obtain equitable relief; there are few if any cases[6] where relief has been granted.

§ 186. Exemption from liability for waste—"equitable waste."

A tenant in fee may do with his land exactly as he pleases so long as he does not violate the rights of his neighbors. He may cut or burn the timber, destroy the buildings, and sow the land to salt if he so desires without incurring any liability therefor either at common law or equity. His own self interest is considered to be an adequate safeguard against such destructive acts. The same is true of the tenant in tail so long as there is possibility of issue, because he may bar all the remainders and make his estate into a fee simple.[1]

In England, it became quite common for the instrument creating an estate for life or years to provide that the tenant shall be "unimpeachable for waste" or "without impeachment of waste."[2] The effect of this at common law was to give to such a tenant the same power and immunity in dealing with the land as if he were the owner in fee simple in possession.[3] Equity, however, placed a limit to this common law immunity by enjoining an unreasonable destruction of the property, and such an abuse by a tenant unimpeachable at law

6. Relief was refused in Castleman v. Craven (1733) 22 Viner's Abridg't 523, pl. 11, 1 Ames Eq. Cas. 466 (allowing houses to go out of repair). See also Powys v. Blagrave (1854) 43 E. R. 582.

1. Savile's Case, Cases, *tempore* Talbot 16 (cited), 1 Ames Eq. Cas. 472 (the tenant in tail, an infant in poor health, was proceeding to cut down a large amount of timber). See also Gannon v. Peterson (1901) 193 Ill. 372, 62 N. E. 210 (holder of determinable fee who was still likely to have children).

2. This was apparently done to avoid the possibility of a forfeiture of the estate under the Statute of Gloucester. The doctrine has been fully developed in England but there are only a few American cases; Tiffany, Real Property § 252.

3. Bowles' Case (1615) 11 Coke 79.

came to be known as "equitable waste."[4] The more common instances of such abuse are the cutting of ornamental timber,[5] or of very young timber[6] or of an unreasonably large amount of timber[7] and the destruction of buildings.[8]

§ 187. Same—persons affected by the doctrine.

The jurisdiction of equity in equitable waste was later extended so as to include not only tenants for life or years who had been expressly unimpeachable for waste but also those whose estates were considered of greater dignity than a simple life estate but whose self interest[1] might lead them to an abuse of the property. It thus includes tenant in tail after possibility of issue extinct,[2] jointress in tail[3] and tenant in fee subject to an execu-

4. This illustrates the greater flexibility of equity. The common law courts would have found it difficult if they had tried, to take a middle ground between holding such a stipulation entirely valid and entirely void; but equity could restrain abuse while allowing reasonable use.

5. Packington's case (1744) 3 Atk. 215, 1 Ames Eq. Cas. 469, note.

6. Aston v. Aston (1749) 1 Ves. Sr. 264.

7. Bishop of Winchester's case (Prior to 1638), Rolle Abridg't, 380 (T. 3), 1 Ames Eq. Cas. 469; Robinson v. Lytton (1744) 3 Atk. 209.

8. In Vane v. Lord Bernard (1716) 2 Vernon 378, 1 Ames Eq. Cas. 470 the defendant had stripped Raby Castle of the lead, iron, glass doors and boards; the court gave specific reparation by compelling the defendant to restore the castle to its original condition. See also Bishop of London v. Webb (1718) 1 Peere Wms. 527. But where the mansion house had become undesirable for a residence and the materials in it were used in rebuilding, relief was denied. Morris v. Morris (1858) 3 DeG. & J. 323.

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1. This would most likely happen where the holder of the particular estate is unfriendly to the holder of the fee and desires to enrich himself or his personal representatives at the fee holder's expense.

2. Williams v. Day (1680) 2 Cases in Ch. 32, 1 Ames Eq. Cas. 476.

3. Skelton v. Skelton (1677) 2 Swanst. 170, 1 Ames Eq. Cas. 473.

tory devise over.[4] A somewhat similar jurisdiction is exercised to protect the interest of a mortgagee against a mortgagor in possession to prevent the latter from so using the land as to impair the security of the former;[5] and to protect the interest of an unpaid vendor against a purchaser in possession.[6] A mortgagee in possession has no greater right in using the land than a simple tenant for life or years and may be enjoined from committing legal waste, the mortgagor being regarded in equity as the owner of the land.

A more difficult question is presented in the case where a tenant in common out of possession seeks to enjoin his cotenant in possession from committing acts of waste.[7] If the plaintiff has already brought a bill for partition of the land, equity will by injunction preserve the *status quo* till the partition suit is decided.[8] If the plaintiff has not brought suit for partition he can prevent an unusually destructive use of the property,

4. Turner v. Wright (1860) 2 De G., Fisher & Jones 234, 1 Ames Eq. Cas. 476.

5. Brady v. Waldron (1816) 2 Johns Ch. 148, 1 Ames Eq. Cas. 483. The jurisdiction is limited to acts which might impair the security in the particular case; if the threatened act would not injure the security the mortgagee apparently can not enjoin, no matter how destructive the act may be; King v. Smith (1843) 2 Hare 239. Nothing here turns upon whether the legal title or legal lien theory of mortgage is followed.

6. Crockford v. Alexander (1808) 15 Ves. 138, 1 Ames Eq. Cas. 221. The principle also protects the holder of a ground rent against acts which tend to impair his security. Crowe v. Wilson (1886) 65 Md. 479; a judgment creditor, Jones v. Britton (1889) 102 N. Ca. 166, 9 S. E. 544; and see 1 Ames Eq. Cas. 484 note. As to the right of the mortgagor or vendor to sue at law for the impairment of security, see 22 Harv. Law Rev. 387. There can obviously be no relief after the mortgage debt or purchase price has been paid.

7. The right to sue at law was given by St. Westm. II. (1285) 13 Edw. I, c. 22. See Tiffany, Real Property § 257.

8. Hawley v. Clowes (1816) 2 Johns Ch. 122, 1 Ames Eq. Cas. 484, (injunction granted against cutting of timber except that wanted for the necessary use of the farm.)

upon the principle of equitable waste.[9] Whether he can get relief against legal waste without bringing suit for partition seems to be unsettled but the better view is that he cannot.[10]

§ 188. Basis for the doctrine.

It is usually stated that the doctrine of equitable waste is based upon the presumed intention of the creator of the estate.[1] Upon this theory it has been held that if trees were intended by the testator to be ornamental the remainderman in fee may enjoin their destruction without regard to whether they were ornamental in fact;[2] and Lord Eldon held that if the trees were not planted or left standing for ornament, no injunction would issue tho they were in fact ornamental.[3] If the intent of the creator of the estate were the real basis a provision that a life tenant shall have as full and complete control of said premises as if he held the fee would deprive the remainderman in fee of equitable

9. McCord v. Oakland Quicksilver Mining Co. (1883) 64 Cal. 134, 144, 27 Pac. 863.

10. Mott v. Underwood (1896) 148 N. Y. 463, 42 N. E. 1048 (co-tenant may remove oysters from oyster bed); but see Williamson v. Jones (1897) 43 W. Va. 562, 27 S. E. 411 (co-tenant may not take petroleum oil); Murray v. Haverty (1873) 70 Ill. 318 (co-tenant may not dig coal). In the last two cases the burden is thus thrown upon the tenant in possession to bring the bill for partition if he is not satisfied.

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1. Ormonde v. Kynersley (1820) 5 Maddock 369: "The presumed intention of the testator that he meant an equal benefit to all in succession." The extension of the doctrine to the holder of a fee subject to an executory devise over was also made upon the basis of the supposed intent of the testator; Turner v. Wright (1860) 2 De Gex, Fisher & Jones 234, 1 Ames Eq. Cas. 476.

2. Wombwell v. Belasyse (1825) 6 Ves. 110 a, note.

3. Coffin v. Coffin (1821) Jacob 70; but see Packington's Case (1744) 3 Atkyns 215. If the trees have been planted or the buildings erected by the tenant, it is obviously not equitable waste for the tenant to remove them. Pevis v. Pevis (1750) 1 Ves. 521.

relief; but the few decisions on the point are *contra*[4] and right, because the real basis of the doctrine is the public and social interest in the economic and beneficial use of the land.[5]

§ 189. Equitable relief after waste has been committed.

After waste has been committed equity may compel the defendant to restore the premises to their former condition if that is feasible;[1] but instances of such affirmative decrees are rare.[2]

Where an ordinary tenant for life or years has committed waste and the plaintiff does not ask an affirmative decree by way of specific reparation of past waste or an injunction to prevent future waste, equity will not ordinarily entertain the suit for compensation[3] because the common law remedy is adequate. But if a tenant who is not impeachable for waste has committed equitable waste equity will entertain a suit for com-

4. Duncombe v. Felt (1890) 81 Mich. 332; Stevens v. Rose (1888) 69 Mich. 259 ("to use and control as the lessee thinks proper, for his benefit during his natural life").

5. In its origin it no doubt had also an ethical basis. See Micklethwait v. Micklethwait (1857) 1 De G. & J. 504, 524: "At law a tenant for life without impeachment of waste has the absolute power and dominion over the timber upon the estate, but this court controls him in the exercise of that power, and it does so, as I apprehend, upon this ground, that it will not premit any unconscientious use to be made of a legal power."

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1. Where the waste has consisted in cutting down timber or removing minerals from the land, specific reparation is obviously physically impossible.

2. Vane v. Bernard (1716) 2 Vernon 338, 1 Ames Eq. Cas. 479 (decree to repair and restore a partially dismantled castle); Klie v. Von Broock (1897) 56 N. J. Eq. 18, 37 Atl. 469 (decree that door way though partition wall be closed, and plaintiffs given the option of doing the work).

3. Lippincott v. Barton (1886) 42 N. J. Eq. 272, 10 Atl. 884; Jesus College v. Bloom (1745) Ambler 54, 1 Ames Eq. Cas. 481. Where the court does grant an injunction to stay future waste, it will, on the principle of doing complete justice, compel an account of previous waste.

pensation even tho no injunction or affirmative decree is asked, because the doctrine of equitable waste is not recognized at common law.[4]

Where waste has consisted in creating chattels by severance from the soil, equity will not enjoin their removal[5] from the land even tho an injunction against future severance is asked and given, unless the defendant is insolvent[6] or other special circumstances appear.[7]

§ 190. The right to the proceeds of waste.

Where timber has been cut under order of an equity court the proceeds of the timber become a trust fund for the benefit of the tenant or tenants for life in succession until the first tenant for life without impeachment for waste is reached, who takes the principal.[1] Such a result would seem to be the most desirable in

4. Lansdowne v. Lansdowne (1815) 1 Maddock 116, 1 Ames Eq. Cas. 482 note

5. Watson v. Hunter & McClay (1821) 5 Johns Ch. 169. Ordinarily the common law remedies of case, trover or replevin are adequate. As to equity preventing the removal of chattels generally see *ante* § 44, and *post* § 202.

6. As to the effect of insolvency in trespass cases see *post* § 201. Equity will also enjoin removal of goods where there would be irreparable injury to the plaintiff's business; Watson v. Sutherland (1866) 5 Wall 74, 1 Ames Eq. Cas. 531 (defendant threatened to levy upon plaintiff's stock of goods).

7. Whether a mortgagee can prevent the removal of chattels wrongfully severed by a mortgagor would seem to depend upon which theory of the mortgage is followed. Under the legal title theory the mortgagee has the legal title to the chattels and may prevent removal if the mortgagor is insolvent or the legal remedy is otherwise inadequate. But where the legal lien theory is followed the mortgagee can not bring trover for severed chattels; Cooper v. Davis (1843) 15 Conn. 556 and therefore can not get an injunction; Bank of Chenango v. Cox (1875) 26 N. J. Eq. 452; see 1 Ames Eq. Cas. 484 note.

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1. Gent v. Harrison (1859) Johnson 517. In Bewick v. Whitfield (1734) 3 Peere Wms. 267 where there was apparently no intervening life tenant unimpeachable for waste, the court said that the proceeds of timber so cut because it was decaying should go to the owner of

all other cases where the tenant in possession is not at fault,[2] as for example, where the timber has been wrongfully cut by a stranger or has been blown down by a storm; and this principle has been recognized to the extent that if the timber is thus severed while a tenant unimpeachable for waste is in possession, the latter, not being in fault, is entitled to the timber[3] just as if he had himself cut it.[4] But where the tenant in possession is impeachable for waste and timber is destroyed either by himself or a stranger or a storm, and there is no ground for getting into equity the proceeds[5] must go as a lump sum; since, therefore the estate of a succeeding tenant without impeachment may never come into possession,[6] the one holding the first estate of inheritance is entitled.[7]

the first estate of inheritance, subject to the right of the tenant in possession to have enough timber left for repairs and botes and to compensation for any damage suffered.

2. If the tenant in possession has wrongfully cut down timber he should not be allowed to derive any benefit from the proceeds of such timber. Lushington v. Bolden (1851) 15 Beav. 1 (tenant for life without impeachment of waste cut down ornamental timber). See also Lansdowne v. Lansdowne (1815) 1 Maddock 116; the case being in an equity court the court directed that the proceeds be invested for the benefit of those in succession.

3. Anonymous (1729) Moseley 237 (cut down by stranger); Bateman v. Hotchkin (1862) 31 Beav. 486 (timber blown down); *In re* Barrington (1886) L. R. 33 Ch. Div. 523 (coal severed by stranger).

4. A tenant unimpeachable for waste who does not abuse his privilege is entitled to keep the timber thus severed. Bowle's Case (1615) 11 Coke 79.

5. *I. e.*, of the timber blown down or of the common law cause of action against either the tenant or the stranger.

6. That a tenant for life without impeachment may not bring trover for timber felled before his estate has come into possession, see Pigot v. Bullock (1792) 1 Ves. Jr. 479, 483.

7. Whitfield v. Bewit (1724) 2 Peere Wms. 240, 1 Ames Eq. Cas. 460; Tiffany, Real Property § 256. In Williams v. Duke of Bolton (1784) 1 Cox 72 the defendant had an ordinary life estate and a vested remainder in fee, there being some intermediate contingent estates of inheritance; the court ordered the proceeds of the waste to be paid into court with liberty to anyone interested to apply; the court was

C. TRESPASS.

I. Trespass to land.

§ 191. Common law and equitable remedies for trespass to land.

The common law action of trespass *quare clausum fregit* lay only in favor of one in possession of land against one who directly[1] interfered with such possession:[2] if the land was in the possession of the holder of a particular estate and the plaintiff wished to recover damages for the injury to his reversionary interest by a stranger,[3] he was compelled to bring an action on the case;[4] and if the land was in the possession of the defendant himself the plaintiff could not bring either trespass or case but must bring ejectment.[5]

In all of the cases just outlined equity calls the act of the defendant a trespass and, under some circumstances will enjoin threatened trespasses and give specific reparation for trespasses already committed.

§ 192. Requiring the plaintiff to establish his right at law—early rule.

Logically one would expect that courts of equity would give a remedy in all cases where the common law

influenced by the fact that the holder of the vested remainder was also the tort feasor. The ground for equity jurisdiction in the case does not appear.

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1. For indirect interference with possession—for example, acts amounting to a nuisance—he must bring an action on the case. See *post* § 204.

2. Since trespass was used not only to recover for actual loss suffered but also to obtain a declaration or vindication of his property right, he was entitled to recover a judgment for nominal damages tho he had suffered no loss.

3. If the injury was occasioned by the tenant it was waste; see *ante* § 183.

4. Unless he has peaceably repossessed himself, in which case he may then bring an action of trespass for *mesne* profits. See *infra* note 5.

5. After getting the judgment in ejectment the plaintiff could then bring an action of trespass for *mesne* profits which was in substance quasi contractual. See 1 Chitty, Pleading § 215; Woodward, Quasi Contracts § 284.

remedy is not adequate, just as in cases of waste; but the early rule was that if the defendant disputed the plaintiff's title or in any other way[1] claimed a right to do the act threatened, the mere fact that there was a dispute precluded equitable relief. In Pillsworth v. Hopton[2] Lord Eldon said: "I remember perfectly being told from the bench very early in my life that if the plaintiff filed a bill for an account, and an injunction to restrain waste,[3] stating that the defendant claimed by a title adverse to his, he stated himself out of court as to the injunction."[4]

At that time there were two fairly adequate reasons for the rule. One was that the method of trial by deposition in equity courts was not as satisfactory for dealing with complicated questions of property or torts[5]

1. For example, if he claimed an easement or profit over the plaintiff's land.

2. (1801) 6 Vesey 51, 1 Ames Eq. Cas. 488. In Mogg v. Mogg (1786) Dickens 170, 1 Ames Eq. Cas. 486 the defendant had been persuading the plaintiff's tenants to cut down timber; the court refused an injunction upon the sole ground that the defendant was a trespasser tho it did not appear that the defendant claimed any right. And in Mortimer v. Cottrell (1789) 2 Cox 205, 1 Ames Eq. Cas. 487 where the defendant kept on digging in a brick field the court said that "there was no case where this court would interfere by injunction, where the party was a mere stranger, and might be turned out of possession immediately."

3. The term waste is used here to mean a destructive act committed by anybody; in a technical sense the term is used to mean a destructive act by one rightfully in possession; see *ante* § 183.

4. By the very definition of waste in the technical sense no question of title could arise because it is not waste unless the defendant is lawfully in possession. The only question of fact that could arise would relate to the act of the defendant; apparently no contention was ever made that such a question should be passed upon by a jury, perhaps because the jurisdiction of equity over waste became well settled comparatively early.

5. In specific performance cases questions of fact—other than those involved in the construction of the contract—were rarely com-

as a trial in open court which is the normal method under the common law. This has disappeared practically everywhere, equity suits being tried in much the same way as common law actions are tried, the equity judge even considering himself bound by common law rules of evidence tho their existence is to be justified almost entirely by the method of trial by jury. The other was that at that time in England the Chancery court sat only at Westminster while common law courts sat in various parts of the country; hence after the method of trial had been changed and witnesses were examined in open court it would cause a great expense to have them all come to London.[6] At the present time, in probably every Anglo-American jurisdiction, courts of equity are as accessible to suitors as are common law courts.

§ 193. Same—later development.

With the disappearance of the reasons for the rule,[1] the rule itself should have disappeared[2] because it was

plicated; and the construction of the contract was of course for the court and not for the jury.

6. In Salvin v. North Brownspeth Coal Co. (1874) L. R. 9 Ch., App. 705 the court in discussing the appeal says that "it is impossible not to be influenced by this consideration, that an enormous expense has been incurred by the trial in this court and by bringing up the witnesses to London." This was just before the Judicature Act which made equity practically as accessible as law in England.

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1. In the United States questions of title have been rendered less complicated than in England by the registry system.

2. Query as to how far the constitutional right to trial by jury is involved here. If in 1789 the defendant had a well settled right to trial by jury in trespass cases, he may probably still claim it, but assuming such a constitutional right it would not in most jurisdictions require the submission to a jury of a question which was not doubtful even tho it were contested. And furthermore it would seem that the constitutional provision would be satisfied in these cases if the equity judge should himself summon a jury to determine the disputed question.

not a limit upon the existence of equity jurisdiction[3] but merely upon its exercise as a matter of convenience and expediency. But the reasons for the rule were not well understood and hence the rule in modified form still persists in probably the large majority[4] of jurisdictions. As modified the rule is substantially as follows: If there is a *bona fide* and reasonable dispute as to title, equity will give a temporary injunction to preserve the *status quo* till the legal right can be settled at law; if the defendant is in possession the burden will be upon the plaintiff to establish his title by bringing ejectment and it will be necessary for him to make out a more serious case for equitable relief than if the defendant were not in possession. If the plaintiff is in possession and the defendant has actually committed a trespass the burden will be upon the plaintiff to test his legal right by an action of trespass *quare clausum*, but if the defendant has merely threatened a trespass the burden will be upon the defendant to bring ejectment. If the holder of a particular estate is in possession the plaintiff cannot, of course, bring trespass; but he can bring an action on the case if he can show an injury to his reversionary interest; if there is an injury to his reversionary interest the burden will be upon him to establish his title by bringing such an action on the case; if there is no injury to his reversionary interest and none is threatened, he does not need an injunction.

3. Hence, if the defendant has in the court below not raised the point as to prior determining at law it is then too late, and the appeal court may determine the question.

4. In England the rule has been changed by Lord Hale's Act (1862) 25 & 26 Vict. c. 42, providing that the court of chancery in these cases in which it would ordinarily either refuse or postpone relief until after a trial at law, should thereafter either determine the disputed question itself or dirct an issue to a jury. In Lowndes v. Bettle (1864) 3 New Reports 409, 1 Ames Eq. Cas. 499 the court apparently acted under this statute in giving a perpetual injunction tho the defendant claimed title.

§ 194. Plaintiff in possession—(1) Trespass in the nature of waste.

Where the plaintiff is in possession the legal remedy may be inadequate either because of the nature of the defendant's threatened conduct or because of other circumstances; and the conduct may consist of (1) physical injury to the land usually called trespass in the nature of waste, (2) repeated trespasses, (3) a continuing trespass or (4) an encroachment amounting to a taking of possession of part of the plaintiff's land.

Where the defendant's act is such as would be enjoinable as waste if he were in rightful possession, the plaintiff's right to an injunction is fairly well established everywhere except that in most jurisdictions he will be given only a temporary injunction till the right is established at law if there is a contest as to the title and the question is doubtful.[1] In Kinder v. Jones[2] the defendant threatened to cut down ornamental trees claiming that they were on his side of the boundary line; but he defaulted at the trial and the injunction was made perpetual. In Thomas v. Oakley[3] the defendant having a right to take stone from the plaintiff's quarry for use on a part of his estate, took stone for other purposes: the defendant did not claim any right to do so and the court granted a perpetual injunction.

In Echelkampf v. Schrader[4] the plaintiff and the defendant owned a double house; the defendant claiming that there was a mistake in the boundary line between the lots which was supposed to coincide with the line between the two sides of the house, and desiring to rebuild, threatened to cut off three feet of the plaintiff's house which he claimed was on his lot. On account of the very serious damage involved an injunction was

1. As late as 1801 Lord Eldon declared flatly against any equitable relief whatever to a plaintiff out of possession; Pillsworth v. Hopton (1801) 6 Ves. 51, 1 Ames. Eq. Cas. 488.
2. (1810) 17 Ves. 110, 1 Ames Eq. Cas. 490.
3. (1811) 18 Ves. 184, 1 Ames Eq. Cas. 491.
4. (1870) 45 Mo. 505, 1 Ames Eq. Cas. 511.

granted, but since the defendant still claimed title to the three feet, it was made only temporary till the defendant established his title at law by an action of ejectment.[5]

Where the physical injury is only slight, an injunction will be refused unless the legal remedy is otherwise rendered inadequate. In Jerome v. Ross[6] the defendant had removed rock from the plaintiff's premises for which the plaintiff had obtained judgment for twenty-five dollars. In refusing an injunction the court said: "The plaintiff speaks of the injury as irreparable because the loads of stone, taken from the mass of rock, cannot be replaced or restored; but he does not state that the rock was of any use to him, as proper or fit for building, fencing, etc., or that it was even desirable as an object of ornament or taste; there was no need of having the same identical fragments of stone replaced and the injury was not, in the sense of the law, irreparable. It was susceptible of a perfect pecuniary compensation."[7]

§ 195. Same—(2) Repeated trespasses.

Whether the fact that simple trespasses have been repeated in the past and are likely to be repeated in the

5. The fact that the plaintiff's possession is not actual but only constructive, is no bar to equitable relief. King v. Stuart (1897) 84 Fed. 546; and see 7 Col. Law Rev. 65 criticising Downing v. Anderson (1906) 126 Ga. 373, 55 S. E. 184, *contra*.

6. (1823) 7 Johns Ch. 315.

7. In Gates v. Johnson Lumber Co. (1899) 172 Mass. 495, 52 N. E. 736, 1 Ames Eq. Cas. 520 the defendant had bought some bricks which were on the plaintiff's land; the plaintiff had given notice to the defendant to remove them within a certain time; they were not removed and the defendant later broke in and took some of the bricks. The plaintiff, apparently thinking that failure to remove the bricks within the time limited operated to forfeit the property therein to herself, asked for an injunction against the removal of any more bricks and for damages caused by the trespass. No serious injury to the land being shown—either past or prospective—the injunction was refused.

future is a sufficient basis for equitable relief seems to be an unsettled question. Where relief has been given in such cases it has usually been placed either on the ground of avoiding a multiplicity of actions or of preventing the acquisition of an easement; sometimes it is placed on both grounds.[1] As to preventing the acquisition of an easement it would seem that prevention could usually be accomplished either by interfering with the trespasses[2] or bringing an action at law just before the close of any statutory period. As to avoiding a multiplicity of actions at law, there seems to be some confusion as to just what actions would thus be avoided. If the plaintiff were compelled to bring a separate action at law for each and every trespass[3] for which he wished to recover judgment, it would certainly make out a strong case for equitable interference; yet even here it might be urged that if the defendant is solvent a judgment against him in one action at law will usually bring about a cessation of the trespasses. It seems to be settled, however, that the plaintiff may in a single action at law recover for all the trespasses down to the date of the beginning of the action.[4] The real question, therefore, is this: is the bringing of an action before the close of each successive statutory period such a multi-

1. Murphy v. Lincoln (1891) 63 Vt. 278, 22 Atl. 418.

2. In reply to this it may be argued that the plaintiff ought not to be compelled to rely upon what is in substance self help.

3. If the plaintiff should bring separate actions for each trespass it would then be for the defendant and not the plaintiff to invoke the aid of a court of equity by asking for a bill of peace. See *post* § 446. It is difficult to see how the plaintiff can urge as a ground for an injunction the fact that he may bring a separate action for each trespass, when he does not need to bring such separate actions. See 22 Harv. Law Rev. 371 for a failure to distinguish between repeated trespasses and repeated actions for trespasses. See also 1 Keener's Eq. Cas., 193, 198 and 201 for cases of repeated trespasses classified under bills of peace.

4. Washburn v. Miller (1875) 117 Mass. 376, 1 Ames Eq. Cas. 515; it was on this ground that the court refused the injunction. In Boston & M. R. R. v. Sullivan (1900) 177 Mass. 230, 58 N. E. 689, the court seemed to think that a plaintiff would bring a

plicity that a court of equity is justified in giving an injunction? If the statutory period is short and if there is no satisfactory way of compensating the plaintiff for the attorney's fees[5] and for the trouble and vexation of bringing the frequent suits thereby made necessary it would seem that an equity court would be justified[6] in giving relief.

§ 196. Same—(3) Continuing trespass.

Where a simple trespass has lasted continously for a considerable period down to the time of bringing suit, the situation presented is very similar to that of repeated trespasses[1] and should be solved in a similar way.[2] Since it is true that if the plaintiff sues at law he will probably not have the option of bringing separate actions for each day's part of the continuous process, the possibility of bringing such actions becomes important only from the standpoint of the defendant and

separate action for each trespass: ". . . every trespass would give a new right of action. Hence there would arise a great multiplicity of suits." See also Ladd v. Osborne (1890) 79 Iowa 93, 44 N. W. 235.

5. In Boston & M. R. R. v. Sullivan *supra* the court says: "the amount recoverable could not be large, in comparison with the amount expended in litigation."

6. Especially if furthermore there has been a judgment at law and the defendant is still refractory.

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1. See *ante* §195.

2. Cases of this sort seem to be rare. In Hale v. Burns (1905) 91 N. Y. Supp. 929 the defendant, a police captain, suspecting that gambling was going on in the plaintiff's saloon, stationed policemen there continuously day and night; an injunction was granted but upon the unimpeachable ground of conjectural damage to the plaintiff's business. In Phillips v. McAdoo (1905) 94 N. Y. Supp. 265 the element of injury to business seemed to be absent because the property involved was a club house but the police had broken into the building and caused serious damage and the entire attention of the court seems to have been directed to the question whether the breaking was justified; having decided that it was not, an injunction was granted.

then only when such actions are either brought or threatened.[3] A continuous trespass may consist of leaving material on the plaintiff's land; if the amount is so large that it would be very difficult for the plaintiff to disencumber his land, equity will give relief by an affirmative decree. In Wheelock v. Noonan[4] the defendant had obtained from the plaintiff permission to place a few rocks on the plaintiff's vacant lots in New York City for a short time. Under color of this license the defendant dumped large quantities of rocks on the lots and then refused to remove them. The difficulty of finding a place to which to remove the rocks, added to the physical difficulty of removal justified the court[5] in ordering the defendant to effect the removal.[6]

The most common cases of continuous trespass consist of permanent structures such as overhanging eaves or cornice of a building,[7] or water pipes under

3. See *ante* § 195 note 3.

4. (1888) 108 N. Y. 179, 15 N. E. 67, 1 Ames Eq. Cas. 527.

5. The court used the argument of avoiding multiplicity of actions: "He is liable to be sued every day, *die de diem*, for the renewed damages flowing from a continuance of the trespass; and while ordinarily there is no sympathy to be wasted on a trespasser, yet such multiplicity of suits should be avoided." It seems at least doubtful whether the plaintiff should be allowed to bring daily actions; but as already pointed out (*ante* § 195 note) this is an argument only for the defendant's getting equitable relief by a bill of peace.

6. For a similar case where an affirmative decree was awarded see Woodhouse v. Newry Navigation Co. (1898) 1 Ir. R. 161 (ballast, stones and rubbish dumped upon plaintiff's oyster beds). In Starr v. Woodbury Glass Works (1901) 48 Atl. 911 (N. J. Eq.) the plaintiff obtained an injunction against the defendant's further allowing the waste from crude oil to flow over the plaintiff's land.

7. In Wilmarth v. Woodcock (1885) 58 Mich. 482, 25 N. W. 475, relief was given against a projecting cornice. In Crocker v. Manhattan Life Ins. Co. (1901) 31 N. Y. Misc. 687 the upper part of a wall of the defendant's building overhung the roof of the plaintiff's building. The encroachment was high in the air and the cost of removing the wall would be very great, with very slight benefit to the plaintiff. The court decreed that the defendant should remove the encroachment whenever the plaintiff should desire to build. For a criticism of this *in futuro* decree see 14 Harv. Law Rev. 300.

the surface,[8] or wires strung above the surface[9]—acts which are direct interferences with the plaintiff's possession but are still not of sufficient magnitude to constitute such a taking of possession that ejectment will lie.[10] In such cases relief is nearly always given on the ground that to deny it would practically amount to depriving the plaintiff of a portion of the corpus of his land,[11] and is therefore *per se* an irreparable injury.[12] Practically the only cases denying relief are those where the plaintiff's land is of slight value[13] and

8. Goodson v. Richardson (1874) L. R. 9 Ch. App. 221, 1 Ames Eq. Cas. 502. The same reasoning applies to a tunnel under the surface; Richards v. Dower (1883) 64 Cal. 62, 1 Ames Eq. Cas. 517; in City of Hoboken v. Hoboken & M. R. Co. (1908) 70 Atl. 926 (N. J. Eq.) an injunction against a tunnel was refused on the score of public convenience; see 9 Col. Law Rev. 84; and for a similar result see Rileys v. Halifax (1907) 97 L. T. 287 (puddle trench under land of little value).

9. See Phelps v. Berkshire St. Ry. Co. (1911) 210 Mass. 49, 96 N. E. 128.

10. That ejectment will not lie in such cases see Rasch v. Noth (1898) 99 Wisc. 285, 74 N. W. 820; Harrington v. Port Huron (1891) 86 Mich. 116. But for a criticism of this position see 19 Harv. Law Rev. 369.

11. Whether the land owner's rights extend *usque ad coelum* or not, they at least extend as far above or below the surface as he can in fact control.

12. In such cases self help in disencumbering the land is often impracticable and difficult and nearly always involves a destruction of or injury to part of the defendant's property and should not be encouraged. An action for damages will usually give compenation for the damage caused by the encroachment only down to the date of bringing the action and in order to prevent the acquisition of an easement must be brought often enough to prevent the prescriptive period from fully running. (See *ante* § 195). If a judgment for prospective damages should be allowed, it would result in the acquisition of a corresponding easement and therefore a taking of the plaintiff's property—a sort of private eminent domain.

13. Hunter v. Carrol (1888) 64 N. H. 572, 15 Atl. 17, 1 Ames Eq. Cas. 529 (defendant because of a mistake as to a boundary line built some houses partly on the plaintiff's land; the land was almost valueless except for the purposes of litigation; the court refused to order the removal of the houses but decreed that if the plaintiff would file a quitclaim deed for a strip of the land, judgment should be entered

the doctrine of the balance of convenience is applied.[14]

§ 197. Same—(4) Taking possession of part of plaintiff's land.

If the defendant's structure is of such magnitude and importance as to amount to a taking of possession of part of the plaintiff's land, equity will usually refuse to decree a removal of the structure of the ground that ejectment[1] furnishes an adequate remedy at law. In Deere v. Guest[2] the defendant falsely represented to the tenant of the plaintiff that the latter had consented to the erection of a tramway across his farm and erected the tramway before the plaintiff—who lived a long distance away—heard of it. Upon discovering the fact the plaintiff brought trespass—the tenant's lease having expired—and now asks a decree for the removal of the tramway. The defendant being in actual possession of the ground occupied by the structure the court refused equitable relief on the ground that to do so would allow a bill in equity to usurp the place of ejectment.[3]

But if the circumstances are such that ejectment would not accomplish the purpose, equity may give such affirmative relief. In Baron v. Korn[4] the defendant had partly constructed a building which encroached nine inches on the plaintiff's property used as an alley way. The actual clearing of the space here being very important to the plaintiff's business, the

against the defendant for fifteen dollars and costs.) MacGregor v. Silver King Mining Co. (1896) 14 Utah 47, 45 Pac. 1091 (ditch across barren, rocky, uncultivated and comparatively valueless land). And see *supra* footnote 8; 9 Col. Law Rev. 84; 28 Harv. Law Rev. 209.

14. For a discussion of this doctrine see *post* §§ 212-215.

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1. If the facts are such as to make it doubtful whether the structure does or does not amount to a taking of possession it would seem that the plaintiff should have his choice of either ejectment or a bill in equity.

2. (1836) 1 Mylne & Craig 516, 1 Ames Eq. Cas. 492.

3. See also Jones v. Jones (1817) 3 Merivale 160.

4. (1891) 127 N. Y. 224, 27 N. E. 804.

impracticability of obtaining such relief in ejectment induced the court to give the affirmative decree asked for and thereby to place the burden of removal upon the one who erected the obstruction. But where the burden of such removal would have been out of proportion to the benefit which would accrue to the plaintiff, relief was denied.[5]

§ 198. Same—(5) Legal remedy inadequate because of other circumstances.

The surrounding circumstances rather than the nature of the defendant's trespass may be the determining factor in the court's giving an injunction. In London, etc. Ry. Co. v. Lancanshire, etc. Ry. Co.[1] the defendant had built, partly on the plaintiff's land and partly on a public lane, a very strong barrier to prevent all access between the plaintiff's railway station and the public lane. It appeared that the plaintiff had already removed two other weaker barriers previously erected. The court ordered the defendant to remove it[2] on the

5. Hall v. Rood (1879) 40 Mich. 46, encroachment of three inches; in ejectment the plaintiff could get a decree that he be placed in possession but the sheriff would not undertake the task of removing three inches of wall. The plaintiff will thus probably not be able to get effective possession until the building is removed, but he certainly ought to be able to collect from the defendant the rental value of the land until such removal. In Gimbel Bros. v. Milwaukee Boston Store (1915) 161 Wis. 489, 154 N. W. 998, the facts were similar but the refusal of relief was placed upon the ground that the plaintiff being only a lessee had no such interest as would entitle him to an injunction; a less objectionable ground would have been the slight injury which the obstruction caused the plaintiff. See 16 Col. Law Rev 351. The subject of balance of convenience will be discussed *post* §§ 212-215.

1. (1867) L. R. 4 Eq. 174, 1 Ames Eq. Cas. 525.

2. The decree, tho affirmative in substance, was negative in form; this was because there was a notion once prevalent that a court of equity could not give an affirmative decree. Since decrees that a defendant execute a conveyance are affirmative decrees it seems rather odd that such a notion could have obtained a foothold. It has now all but disappeared.

ground of the difficulty of estimating the damage to the plaintiff's business caused thereby.

In Preston v. Preston[3] the defendants had made repeated entries upon the plaintiff's land, defacing his old landmarks and making new ones; equitable relief was given in order to prevent the creation of a cloud upon title[4] and also because of the insolvency of the defendants.[5]

§ 199. Defendant in possession.

If the defendant is in possession of not only a part but of all the land involved, the plaintiff will *a fortiori* be unable to get possession by a bill in equity. But the conduct of the defendant while thus in possession may be so flagrant that a court of equity will give a temporary injunction[1] against acts destructive of the inheritance until the plaintiff can establish his title by getting a judgment in ejectment.[2] In Neale v. Cripps[3] the plaintiff having made affidavit that the defendant was cutting timber in such a manner and to such an extent as nearly to strip the land of all timber trees of any value, a temporary injunction was given until the action in ejectment already brought against the defendant's tenant could be determined.[4] But a court of equity before giving relief will ordinarily require a

3. (1887) 85 Ky. 16, 2 S. W. 501.
4. See *post* §§ 413-419.
5. See *post* § 201.

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1. On the ground of the defendant's conduct being flagrant relief was granted in Dunker v. Field & Tule Club (1907) 6 Cal. App. 524, 92 Pac. 502.

2. In 1801 Lord Eldon laid it down as a flat rule that if the defendant was in possession claiming by an adverse title equitable relief would be refused; Pillsworth v. Hopton (1801) 6 Ves. 51, 1 Ames Eq. Cas. 488.

3. (1888) 4 Kay & J. 472, 1 Ames Eq. Cas. 498.

4. See also Erhardt v. Boaro (1885) 113 U. S. 537, 1 Ames Eq. Cas. 507, where a temporary injunction was given against the defendant's operating a mine until the hearing of an action at law; the action at law ended in favor of the defendant whereupon the injunc-

stronger case of damage to be made out than if the defendant were conceded to be in rightful possession or than if the plaintiff were in possession—especially if the defendant's claim of title[5] is obviously being made in good faith. In other words, the ordinary and reasonable use of the land will not be restrained tho it may involve acts which in a tenant would be waste. In Cox v. Douglas[6] the land being valuable only for timber an injunction against cutting timber was refused and in Snyder v. Hopkins[7] the broad injunction given by the court below was narrowed and modified so as to allow the "ordinary and natural use of the premises."[8]

§ 200. Plaintiff a reversioner or remainderman.

Where the plaintiff's estate in the land is a reversion or a remainder with a particular tenant in possession, his remedy at law is an action on the case but in order to recover he must prove special damage to his own interest in the land. If he cannot prove such special damage he will fail not only at law but also in equity. In Cooper v. Crabtree[1] the plaintiff had rented the land to weekly tenants; the defendant, owner of the lot adjoining, put up a hoarding on poles so as to obstruct the light of one of the plaintiff's windows. The plaintiff claimed that the structure had been erected on his own land and that his tenants were so annoyed by its rattling and creaking that they were likely to leave, and

tion was dissolved; the plaintiff then obtained a reversal of the judgment and the equity court then reinstated the injunction till a decision in the new trial at law should be reached.

5. The fact that the defendant had failed to deny the plaintiff's title under oath was a strong if not the decisive factor in the plaintiff's getting an injunction in Nichols v. Jones (1884) 19 Fed. 855. If no claim of title is made by the defendant the plaintiff's right to an injunction ought to be the same as if the plaintiff were in possession.

6. (1882) 20 W. Va. 175.

7. (1884) 31 Kan. 557, 3 Pac. 367, 1 Ames Eq. Cas. 509.

8. See also the cases collected in 1 Ames Eq. Cas. 511 note.

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1. (1882) L. R. 20 Ch. Div. 589, 1 Ames Eq. Cas. 504.

therefore asked that the structure be ordered removed. Relief was refused on the ground that the plaintiff had not made out a case of injury to the reversion.[2] The tenants were not parties to the suit; the injury to their possession was probably substantial enough to have entitled them to relief in spite of the fact that the defendant intended to keep the structure there for only a year.[3]

On the other hand, if there is substantial injury to the estate in reversion or remainder the holder of such an estate is entitled to an injunction on substantially the same conditions as if his estate had been in possession.[4]

§ 201. Defendant insolvent.

Where the plaintiff's sole remedy at law is an action either of trespass or case for damages, the fact that it would be impossible to collect a judgment at law because of the defendant's insolvency[1] is frequently the deciding factor in the giving of an injunction. In

2. It is at least arguable that a reasonable fear of losing tenants —tho probably not enough to satisfy the common law requirement of special damage—should be enough to warrant an injunction; especially if the premises thus vacated are likely to remain for a long time untenanted and entail not only a loss in rentals but a depreciation in rental value.

3. The fact that in England it is permissible to erect on one's own land an obstruction to prevent the acquisition of an easement of light and air by prescription had probably an important bearing on the decision; if the defendant were forced to remove the hoarding he could place it on his side of the line and be entitled to have it protected there unless it should so creak and rattle as to amount to a nuisance.

4. Schnieder v. Brown (1890) 85 Cal. 205: 24 Pac. 715 (digging a ditch twenty-five feet wide across land).

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1. The defendant's insolvency may be an important factor not only in the giving of an injunction in trespass but in giving equitable relief against other threatened torts. See *post* §§ 235, 237. n. 7. And since other claimants against the defendant can not properly object to the defendant's being enjoined from committing

Hogdson v. Duce[2] the plaintiff alleged that the dedendant took forcible possession of the plaintiff's houses and by threats obtained money from the tenants which the plaintiff was compelled to allow in reduction of rent; and that some of the tenants gave notice to quit because of the annoyance. The defendant *in forma pauperis* demurred to the bill. In giving the relief asked for the court said: "It had been suggested that for these trespasses an adequate remedy might be had at law, and that consequently it was beyond the province of a court of equity to interfere. Unquestionably a court of law would award damages in such a case, but damages against whom? The defendant was a pauper, and as against persons in her position such a form of redress would be the merest mockery of justice."[3]

Where the defendant is in possession his insolvency is no ground for substituting a bill in equity for ejectment for the purpose of getting possession;[4] but it might well be an important factor in determining what acts the defendant may do while in possession.[5]

II. Trespass to chattels.

§ 202. Remedies at law and in equity.

For a wrongful taking of chattels the plaintiff may at law bring an action of trespass or trover; in either

a tort, it is not necessary to draw any distinction here between a defendant being execution proof and being insolvent, as it is in the field of specific performance of contracts. See *ante* § 45.

2. (1856) 2 Jurist [N. S.] 114, 1 Ames Eq. Cas. 523.

3. Musselman v. Marquis (1866) 1 Bush (Ky.) 463; see also Preston v. Preston (1887) 85 Ky. 16, 2 S. W. 501 where the giving of the injunction was placed upon the double ground of insolvency of the defendant and the prevention of a cloud on title. See *ante* § 198.

4. Warlier v. Williams (1897) 53 Neb. 143, 73 N. W. 539.

5. In Nichols v. Jones (1884) 19 Fed. 855 the defendants were in possession mining and removing ore; in giving an injunction against such acts till the trial of the title at law the court relied largely upon the insolvency of the defendants.

action he will ordinarily get a judgment for the value of the chattel. If there has been merely a wrongful detention and he wishes to get back the chattel in specie he may usually do so by either detinue or the modern statutory replevin; if he wishes to get a judgment for its value he can usually get this by bringing trover. If the chattel is unique and there is danger of its being secreted so that the sheriff would have difficulty finding it, equity will command the defendant to deliver it over.[1] *A fortiori* if the defendant is threatening to seize and carry away a unique chattel, equity will enjoin such seizure.[2]

Where the chattels are not unique equitable relief is usually refused because of the adequacy of the common law remedies.[3] But relief at law may be rendered inadequate either because of the insolvency of the defendant[4] or of other special circumstances. In Watson v. Sutherland[5] the defendant, having a judgment against X issued execution on the plaintiff's stock of goods and threatened to have them sold. The execution sale was enjoined on the ground of the irreparable injury which would ensue to the plaintiff because of the loss of business, loss of credit, and probable insolvency.[6]

D. Private Nuisance.

§ 203. Definition.

In order the better to secure to the owner and occupier of land its proper use and enjoyment the com-

1. See *ante* § 46.

2. Sanders v. Sanders, (1859) 20 Ark. 610 (slave) but Kentucky and North Carolina refused such relief in slave cases; Nesmereth v. Bowler (1814) 3 Bibb 487; Du Pre v. Williams (1859) 5 Jones Eq. 96.

3. Johnson v. Conn. B'k (1851) 21 Conn. 148.

4. Kaufman v. Weiner (1897) 169 Ill. 596, 48 N. E. 479.

5. (1860) 5 Wall. 74, 1 Ames Eq. Cas. 531.

6. If the plaintiff's interest in the chattel is purely equitable—e. g. that of a *cestui que trust*—equity will enjoin a third party

mon law has recognized certain rights in addition to the mere right of possession which is redressed by the action of trespass. These non-possessory rights are called natural rights because, like the right of possession, they exist irrespective of the consent of others.[1] These natural rights have been summarized as follows:[2]

(1) To have the air free from unreasonable pollution by disagreeable vapors[3] and odors[4] and also free from unreasonable noise.[5]

(2) To have water in a natural watercourse flow past his land without diminution,[6] deterioration,[7] or alteration[8] by acts on the part of others.

(3) In some states, to discharge water on adjacent land.[9]

from having it sold upon an execution against the trustee. Trueblood v. Hollingsworth (1877) 59 Ind. 542. See *post* § 315.

1. And are thus distinguished from consensual rights; easements and profits are usually consensual but may be acquired by prescription.

2. Tiffany, Real Property p. 649.

3. Cooke v. Forbes (1867) 5 Eq. Cas. 106, ammonia fumes.

4. Ill. Cent. R. R. Co. v. Grabill (1869) 50 Ill. 241, odor from cattle pens.

5. Soltau v. De Held (1851) 2 Sim. [N. S.] 133, bell ringing.

6. Corning v. Windslow (1869) 40 N. Y. 191, diversion of waters from their natural channel, thus interfering with plaintiff's use of water for power.

7. Lingwood v. Stowmarket Co. (1865) 1 Eq. Cas. 77, refuse of paper mill discharged into a river.

8. McCormack v. Horan (1880) 81 N. Y. 86, dam causing flowage over land of an upper proprietor. Where the defendant's act is direct—as, for example, where he desires the particular result—it would seem that trespass would lie; but the distinction between direct and indirect acts is a troublesome one of degree and flowage cases are apparently always classified under nuisances. Whether the tort is trespass or nuisance makes little or no difference in equity; Codman v. Evans (1863) 7 Allen (Mass) 431. See also Pixley v. Clark (1866) 35 N. Y. 520, obstruction injuring land by percolation; King v. Tiffany (1832) 9 Conn. 162, obstruction interfering with operation of a mill up stream.

9. McDaniel v. Cummings (1890) 83 Cal. 515. This is the rule of the civil law. For the "common law rule" *contra*, see

(4) In a few jurisdictions, to be free from injury by the escape of water artificially collected on another's land.[10]

(5) To have his land supported by adjacent[11] and subjacent[12] land.

Any violation of these natural rights[13] is called a private nuisance.[14]

§ 204. Remedies.

Since a private nuisance does not involve a direct interference with possession the appropriate common law remedy is not the action of trespass but an action on the case;[1] in this action the plaintiff ordina-

Garrison v. Hargadon (1865) 10 Allen (Mass.) 106; Tiffany, Real Property § 298, page 664.

10. If the one collecting the water is negligent in allowing it to escape he is of course liable on ordinary tort principles of negligence. In England he has been held liable at peril for the escape; Rylands v. Fletcher (1868) L. R. 3 H. L. 330, but the rule has not been followed extensively in this country, and the tendency of later English cases has been to restrict the scope of the decision. It may be questioned whether such a collecting of water is such a private nuisance as would ever be enjoined.

11. Wyatt v. Harrison (1832) 2 Barn. & Adol. 871, Tiffany, Real Property § 301.

12. Humphries v. Brogden (1850) 12 Q. B. 739, Tiffany, Real Property § 302.

13. The reader is reminded that legal rights are historically the product of legal remedies and not *vice versa;* hence these natural rights exist because the law has in these cases given a remedy.

14. The word "nuisance" means literally nothing more than wrongful harm, and it is not always used in the narrow, specialized sense attached to it by Tiffany. For the sake of clearness and definiteness it will be used in this book in the narrow sense unless otherwise indicated.

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1. The early common law remedies of *assize of nuisance* and *quod permittat prosternere* had already become obsolete by the time of Blackstone, having been superseded by the action on the case; Bl. Comm. Book III, 220. In both the early actions the plaintiff was able to get a judgment not only for damages but for abate-

rily[2] recovers for any damage he may have suffered down to the date of bringing his action. But if the nuisance consists of a permanent structure the weight of authority in this country is that he not only may[3] but must recover prospective damages also.[4] This amounts, in substance, to an informal eminent domain, the plaintiff being thus paid by the judgment for an easement which the defendant thereby acquires. The common law also allows the party injured to abate it;[5] in case of emergency such a privilege is often of great importance.

Altho the jurisdiction of equity for the specific reparation and prevention of private nuisance is of comparatively modern growth, it has come now to furnish the most usual remedy. Where the plaintiff could have recovered substantial damages at law equity will

ment also, but they were much circumscribed in other particulars. Both required that the plaintiff have a freehold interest in the land damaged and the *assize* of *nuisance* lay only against the wrongdoer; the *quod permittat prosternere* lay also, however, against an alienee who continued the nuisance.

2. See 61 U. of Pa. Law Rev. 614.

3. In a few jurisdictions the plaintiff may elect; Danielly v. Cheeves (1894) 94 Ga. 263, 21 S. E. 524; City of North Vernon v. Voegler (1885) 103 Ind. 314, 2 N. E. 821.

4. See Sedgwick, Damages, 9th ed. § 95. For a criticism of this prevailing view see 2 Cal. Law Rev. 248-250. The points urged are briefly as follows: (1) It permits an easement to be acquired without formal condemnation for a private use, because a complete recovery bars all subsequent actions; (2) the easement may be created within a period less than the period of prescription; (3) in order that a subsequent purchaser shall find out the existence of the easement he must search the record for actions brought by previous owners of the land; (4) the rule encourages litigation because a plaintiff whose present damage is slight will be compelled to sue because the running of the statute of limitations will bar him entirely; and a defendant is compelled to pay for a permanent injury tho he might later remove the cause of the damage; (5) it raises the difficult question of what is and what is not a permanent nuisance. See also 8 Mich. Law Rev. 227; 11 Harv. Law Rev. 277; 9 Col. Law Rev. 538.

5. He may destroy property in thus abating if it is the only reasonable and feasible method of achieving the result. Brill v. Flagler (1840) 23 Wend. 354 (dog that disturbed by incessant

usually order the defendant to abate the nuisance.[6] Such a remedy is ordinarily more advantageous than the common law action for damages, because if the plaintiff recovers damages only to the date of the action he will be compelled to bring an action every few years to prevent the acquisition of an easement;[7] and if he recovers prospective damages also his land becomes subject to an easement at once.

Moreover, the equitable remedy is preferable to private abatement because: (1) if the injured party abates he loses his right to sue for the damage already suffered,[8] whereas if he gets an injunction in equity he may get as incidental thereto compensation for past damages; (2) the injured party cannot abate if the nuisance is only threatened[9] but such an objection would not ordinarily defeat an injunction;[10] (3) one who abates takes the risk of being able to show that there really was a nuisance and that in abating he did nothing which was not reasonably necessary to his protection;[11] if he fails to do this he himself becomes a tort feasor. A court of equity, on the other hand, places the burden of abating upon the defendant with no risk to the plaintiff.

§ 205. Essential elements—test.

In order to constitute a nuisance the injury complained of must have been caused by the act of some

barking and howling at night). But he cannot lawfully abate unless he can do so peaceably. Mohr v. Gault (1860) 10 Wis. 513.

6. Crump v. Lambert (1867) L. R. Eq. 409. The exceptions to this rule will be discussed *post* §§ 212-215.

7. Unless the recovery of the judgment at law overcomes the obstinacy of the other party and induces him to abate the nuisance.

8. Baten's Case (1611) 9 Co. Rep. 53 b, 54b.

9. Gates v. Blincoe (1834) 2 Dan. (Ky.) 158.

10. Unless it is fairly clear that the plaintiff is in no imminent danger; Fletcher v. Bealey (1885) 28 Ch. D. 188, vat wash emptied by the defendant into the river would not injure the plaintiff for some time.

11. State v. Moffett (1848) 1 G. Greene 247.

human being; if it is the result of natural causes to which the act of man has not contributed, the plaintiff is without remedy either at law or in equity. In Roberts v. Harrison[1] a petition was filed for the removal of a pond that had collected on the defendant's land. Relief was denied because "the accumulation of water was due to natural causes, and the defendant did not, by his own act or negligence, contribute to bring about the alleged nuisance. . . . The defendant had done nothing to interfere with the natural drainage, and the pond was formed by the overflow of the creek, due entirely to causes over which the defendant had no control."

Furthermore, even if the damage had been caused by the defendant's act, he may escape liability if the social interest in the doing of the act is sufficiently great to justify it and the damage caused thereby. In Middlesex Co. v. McCue[2] the plaintiff asked that the defendant be restrained from filling the plaintiff's mill pond. The defendant owned and cultivated in the ordinary way land upon the side of a hill sloping down to the pond. On account of the great importance of having land cultivated relief was denied:[3] "Liability depends upon the nature of the act and of the kind and degree of harm done, considered in the light of expediency and usage. . . . [The plaintiff] complains not that substances brought down are offensive, but that the defendant caused any solid substances to be brought down at all. Practically it would forbid the defendant to dig his land, at least without putting up a guard, since the surface drainage necessarily carries more of the soil

1. (1897) 101 Ga. 773, 28 S. E. 995. See 12 Harv. Law Rev. 63; Mohr v. Gault (1860) 10 Wis. 513.

2. (1889) 149 Mass. 103, 21 N. E. 230.

3. See also Giles v. Walker (1890) 24 Q. B. D. 656, cultivation of forest land caused thistles to grow and spread their seed to adjoining land. It seems fairly clear that by legislation under the police power, a duty might be imposed upon the land occupier in such cases and perhaps even in a case like Roberts v. Harrison, *supra*.

along with it if the earth is made friable by digging. . . . We are of the opinion that a man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain and that damage to the lower proprietor of the kind complained of is something that he must protect himself against as best he may.'"[4]

If the alleged nuisance consists of interference with health and comfort, the test is what is reasonable under all the circumstances according to the standard of people generally. In Rogers v. Elliott[5] the plaintiff complained of the ringing of a bell in a church just across from the residence of his father, with whom the paintiff lived. The latter had suffered a sunstroke and because of this he was thrown into convulsions every time the bell was rung. It was held proper to direct a verdict for the defendant: "A fundamental question is, by what standard, as against the interests of a neighbor, is one's right to use his real estate to be measured. . . . The inquiry always is, when rights are called in question, what is reasonable under the circumstances. If a use of property is objectionable solely on account of the noise which it makes, it is a nuisance, if at all, by reason of its effect upon the health or comfort of those who are within hearing. The right to make a noise for a proper purpose must be measured

4. Another case involving the social interest in the improvement of land is Falloon v. Schilling (1883) 29 Kan. 292. In that case the plaintiff's petition alleged that in order to compel the plaintiff to sell to the defendant a piece of land at the defendant's price, the latter threatened to put up on his own land small tenement houses and to rent them to negroes, and had actually erected one house and rented it to a negro family, to the great annoyance, etc. of the plaintiff. The demurrer to the petition was sustained on the ground that the size of the buildings was a matter for the defendant to determine and that "the law makes no distinction on account of race or color and recognizes no prejudices arising therefrom. As long as that neighbor's family is well behaved, it matters not what the color, race or habits may be, or how offensive personally or socially it may be to the plaintiff; plaintiff has no cause of action in the courts."

5. (1888) 146 Mass. 349, 15 N. E. 768.

in reference to the degree of annoyance which others may reasonably be required to submit to. In connection with the importance of the business from which it proceeds, that must be determined by the effect of noise upon people generally and not upon those on the one hand, who are peculiarly susceptible to it, or those, on the other, who by long experience have learned to endure it without inconvenience; not upon those whose strong nerves and robust health enable them to endure the greatest disturbance without suffering; nor upon those whose mental or physical condition makes them painfully sensitive to everything about them."

§ 206. Damage.

Where the alleged nuisance consists of an interference with personal comfort no tort is proved unless substantial damage is shown.[1] But where the alleged nuisance consists of an injury to land or to the beneficial use thereof there has been a strong tendency to regard the plaintiff's right as actionable without proof of any damage. In Mann v. Willey[2] the plaintiff complained that the defendant, an upper riparian proprietor, had polluted the water of Gulf Brook by discharging all tht sewage from his hotel into it. The only use to which the plaintiff had ever put the water was for bathing and turning a turbine wheel and the defendant contended that since for such purposes the water was in no way injured there was no tort and the plaintiff was not entitled to an injunction. This contention was held unsound: "That the discharge of such sewage into the stream does pollute and render it unfit for domestic purposes cannot be doubted, and is, we think, established by the evidence, and even though the plaintiff has not as yet put the water[3] to such a use, she had

1. St. Helen's Smelting Co. v. Tipping (1865) 11 H. L. C. 642, 650.

2. (1900) 51 N. Y. App. Div. 109, 1 Ames Eq. Cas. 572.

3. Most of the cases holding the plaintiff's right to be technical have been cases of water rights, but Dana v. Valentine (1842)

the right to the stream in its natural purity. . . . And that right was not conditioned upon the beneficial user of it. . . . And she was entitled to equitable relief against the defendant for interfering with it though the damages were merely nominal."[4]

Wherever the natural right is thus held to be technical,[5] equity will prevent its violation[6] as the most

5 Metc. 8, was the case of a slaughterhouse and Farley v. Gate City Gas Light Co. (1898) 105 Ga. 323, 31 S. E. 192, the plaintiff complained of gas and noxious vapors.

4. See *contra* Sturgis v. Bridgman (1879) 11 Ch. Div. 852. The defendant was a confectioner and for twenty-six years used on his premises pestles and mortars for breaking up and pounding hard substances. The plaintiff, a physician, built his consulting room against the defendant's wall and the noise and vibration of operating the pestles interfered with his practice. In answer to a suit for an injunction the defendant set up prescription but the court decided against this contention on the ground that the plaintiff had no cause of action till he suffered damage. But see Roberts v. Gwyrfai District Council (1899) 1 Ch. D. 583, adopting the prevailing American doctrine in a case of altering the current of a stream; 13 Harv. Law Rev. 142. In Howard Co. v. R. R. (1895) 130 Mo. 652, 32 S. W. 651, a distinction was taken between a case where the damage can be measured once for all at the time of the creation of the alleged nuisance and a case where the amount of damage depends upon future events, holding that only in the former case does the prescriptive period begin at once; see 4 Harv. Law Rev. 435.

5. The reasons given as to whether the right should be considered a technical right are usually unsatisfactory. In Farley v. Gate City Gaslight Co. *supra*, the court gave the fictitious reason that "the law imports damages" which is only another way of saying that it is unnecessary to prove any damage and does not answer the question at all. The real question is a rather difficult one of balancing of interests. In Sturgis v. Bridgman, *supra*: "It would be on the one hand in a very high degree unreasonable and undesirable that there should be a right of action for acts which are not in the present condition of the adjoining land, and

6. Amsterdam Knitting Co. v. Dean (1900) 162 N. Y. 278, 56 N. E. 757, 1 Ames Eq. Cas. 573 (diversion of water): "Where the act complained of is such that by its repetition or continuance it may become the foundation or evidence of an adverse right, a court of equity will interpose by injunction, though no actual damage is shown or found."

satisfactory method[7] of preventing the acquisition of an easement by prescription.[8]

§ 207. Legalizing nuisances.

Since England has no written constitution Parliament has power to legalize any nuisance whatever; but the statutory authorization of a business is not construed as legalizing a nuisance if the business can be carried on

7. But see Dana v. Valentine (1842) 5 Metc. 8: "And there seems to be no good reason to doubt, that if the plaintiffs can maintain an action at law, they may obtain an adequate remedy without any interposition of a court of equity." Just what the court had in mind is not clear. The plaintiff could, of course, prevent the acquiring of an easement by suing at law just before the expiration of any statutory period.

8. It seems to be well settled that no prescriptive right to maintain a public nuisance can be acquired. Mills v. Hall (1832) 9 Wend. (N. Y.) 315. Where, however, the nuisance is a purely private one, the rules seems to be that prescription does apply; St. Helen's Smelting Co. v. Tipping (1865) 11 H. L. C. 642. But, as pointed out by Wood, Nuisance § 712, where the nuisance consists of polluting the atmosphere, as in Campbell v. Seaman (1876) 63 N. Y. 568, it is very difficult to establish a user for the requisite period.

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5 Continued.

possibly never will be any annoyance or inconvenience to either its owner or occupier; and it would be on the other hand, in an equal degree unjust, and from a public point of view inexpedient that the use and value of the adjoining land should, for all time and under all circumstances, be restricted and diminished by reason of the continuance of acts incapable of physical interruption and which the law gives no power to prevent." See also 22 Harv. Law Rev. 128: "The general adoption of such a rule [holding damage unnecessary] would entail a constant watchfulness by land owners for possible future damage and much accompanying litigation. And in the absence of such caution prescriptive rights would so multiply as to impair seriously the development of property." On the other hand, see 13 Harv. Law Rev. 142: "While it is hard for one who at present does not wish to use his land in a certain way to be deprived of its future use, it is harder still for one committing the nuisance to be driven out of business simply because a neighboring proprietor decides to change his mode of occupation. It would be in the power of the latter to destroy at his option permanent and extensive works." See 12 Harv. Law Rev. 284.

without creating one.[1] In the United States such legislation is usually unconstitutional as within the prohibition against depriving a person of his property without due process of law or against taking private property for public use without compensation.[2] It has been suggested, however, that such a prohibition applies only to grave and serious nuisances, and that small nuisances may be legalized as a proper exercise of the police power of the state.[3] If the statute authorizing the nuisance is valid,[4] both legal and equitable relief are barred.

§ 208. Culpability of defendant.

Liability for private nuisance dates back to a time when apparently all tort liability was absolute, not dependent upon any culpability or blameworthiness on the part of the defendant: "He that is damaged ought to be recompensed."[1] This liability at peril has very largely persisted where injuries to property rather than injuries to the person have been concerned, irrespective of the form of action involved.[2] Hence a defendant may be liable for the creation of a nuisance tho done without his knowledge or consent by an independent contractor

1. Shelfer v. City of London Lighting Co. (1895) 1 Ch. D. 287, 1 Ames Eq. Cas. 589: "It is clearly for the defendants to prove, if they can, the truth of their assertion that it is impossible for them to carry on their business without creating a nuisance. . . . The defendants have not proved that they cannot supply electricity properly if they multiply their stations and diminish the power of their engines at each station."

2. U. S. Constitutional Amendments 5 and 14.

3. Sawyer v. Davis (1884) 136 Mass. 239: "Slight infractions of the natural rights of the individual may be sanctioned by the Legislature under the proper exercise of the police power, with a view to the general good."

4. See 14 Col. Law Rev. 590, 610 as to the effect of legislation and State constitutional provisions authorizing the operation of railways.

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1. See Basely v. Clarkson (1681) 3 Levinz 37: "His intention and knowledge are not traversable; they cannot be known."

2. See 59 U. of Pa. Law Rev. 298, 309, 310.

who has been carefully selected.[3] Where, however, the defendant is a vendee[4] of land upon which a nuisance has been already created[5] he becomes liable only upon principles of negligence,[6] being entitled to a reasonable opportunity to abate the nuisance after knowledge of its existence.[7]

Where the damage caused to the plaintiff by a nuisance is purely personal—having no reference to any injured land[8]—such as injuries to the health of persons

3. Storrs v. Utica (1858) 17 N. Y. 104 (constructing sewer through street). And if the structure erected by the defendant does not prove to be a nuisance until later he is not entitled to any notice to abate; Bowner v. Welborn (1849) 7 Ga. 296: "*Eo instante* in which the use of his property becomes injurious to another, it is a nuisance and he is liable in damages. This liability depends upon no other fact or circumstance—if the nuisance exists, if the damage is proven, the law, without more, attaches to him the liability." See also Vile v. Pa. R. R. Co. (1914) 246 Pa. 35, 91 Atl. 1049.

4. That the creator of the nuisance does not escape liability merely by selling or leasing his hand, see Plumer v. Harper (1824) 3 N. H. 88. But a landlord is not liable for a nuisance created by his tenant unless he expressly or impliedly authorized it; Edgar v. Walker (1898) 106 Ga. 454, 32 S. E. 582.

5. Where the defendant has erected a nuisance on land belonging to a third party it is no defense that the defendant's removal of the nuisance will expose him to liability to such third party; Thompson v. Gibson (1841) 7 M. & W. 456.

6. Hayes v. Brooklyn Heights R. R. Co. (1910) 200 N. Y. 183, 93 N. E. 409.

7. It is usually said that the grantee is entitled to notice to abate before becoming liable for the continuance of the nuisance; Jones v. Williams (1843) 11 M. & W. 176; Pierson v. Glean (1833) 14 N. J. Law 36; but apparently knowledge from any source would be enough; see Leakan v. Cochran (1901) 178 Mass. 566, 60 N. E. 382. Similarly, where an injunction has been issued against the previous owner's maintaining a nuisance, it would seem that the vendee should not be held guilty of contempt till he had knowledge of the injunction; 21 Harv. Law Rev. 220; criticising State v. Porter (1907) 76 Kan. 411, 91 Pac. 1073.

8. Where the damage complained of is damage to land, the plaintiff must show some interest in the land; see Miller v. Edison Elec. Illuminating Co. (1901) 68 N. Y. Supp. 900; lodgers in hotel disturbed by vibration. On the right of a reversioner to complain of a nuisance see 19 Harv. Law Rev. 541. If the defendant has

having no property interests affected by the nuisance, there is a square conflict of authority as to whether the defendant's liability is at peril[9] or only for negligence.[10]

§ 209. Motive of defendant—"spite fences"—percolating waters.

Since an easement of light and air may be acquired by prescription in England and the only way of preventing its being thus acquired is by erecting a structure which will shut off the light and air, the erection of any structure for this purpose is permissible; the motive for such an erection can be no bar because it is a beneficial use of the property to prevent the acquisition of an easement over it.[1]

In the United States an easement of light and air can not be acquired by prescription; but on the question of the validity of a structure which is of no beneficial use to the one erecting it, but has been erected from motives of spite, revenge, intimidation, etc, there is a

acted intentionally or negligently in creating or maintaining a nuisance he is liable to any one injured thereby without reference to the plaintiff's interest in any land.

9. Hosmer v. Republic Iron and Steel Co. (1913) 179 Ala. 415, 60 So. 801 (noxious vapors caused death of young child who lived with his father). And see Fort Worth etc. R. R. v. Glenn (1904) 97 Tex. 586, 80 S. W. 992 (an old well caused serious illness of young child who lived with his father). See also 13 Col. Law Rev. 433: "While this view presents somewhat of an extension of the strict common law conception of a nuisance, such an expansion, in order to give a remedy to an infant, living with the parent on the latter's premises, seems thoroughly justifiable; for there appears to be no occasion for compelling an infant to leave his father's home to avoid the consequences of another's unlawful act, which is really an injury to the occupancy of the land."

10. Ellis v. Kansas City etc. R. R. (1876) 63 Mo. 131 (wife of lessee of premises made ill by nuisance); Holley v. Boston Gas Light Co. (1857) 8 Gray (Mass.) 123 (nine year old child injured by escape of gas). This view seems to be more nearly in accord with the historical development of the law of torts; see 26 Harv. Law Rev. 760.

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1. See Chandler v. Thompson (1811) 3 Campb. 80.

conflict of authority.[2] In some jurisdictions statutes have been passed making unlawful the building of such structures beyond a certain height,[3] and such statutes have been held constitutional.[4] If such structures are held unlawful either with or without a statute, equity will usually enjoin their erection or decree their removal, just as in other cases of private nuisance.

A similar situation exists as to malicious interference with percolating waters. English courts deny relief on the ground that a landowner has an absolute right to the percolating waters which he can intercept in his land and is not liable to an adjoining proprietor, regardless of the quantity of water taken, or the purpose

2. For a collection of cases on each side, see Letts v. Kessler (1896) 54 O. St. 73, 42 N. E. 765: In that case the plaintiff alleged that the defendant was erecting a high board fence on his ground which would obstruct the windows of her hotel and deprive her of light and air, and that the fence was not being erected for any useful or ornamental purpose, but from motives of pure malice alone. Relief was refused. "As long as he keeps on his own property and causes an effect on her property which he has a right to cause, she has no legal right to complain as to the manner in which the effect is produced, and to permit her to do so would not be enforcing a rule of property, but a rule of morals." But the better view and probably the weight of authority in this country is that one has no absolute right to erect structures on his land and does not have the right to erect useless structures on his land for the sole purpose of injuring others. Burke v. Smith (1888) 69 Mich. 380, 37 N. W. 838: "The right to breathe the air and to enjoy the sunshine is a natural one; and no man can poilute the atmosphere or shut out the light of heaven, for no better reason than that the situation of his property is such that he is given the opportunity of so doing, and wishes to gratify his spite and malice toward his neighbor." See also 12 Col. Law Rev. 633-635; 25 Harv. Law Rev. 197. Even tho the structure has been erected from spite, it is not considered unlawful if it serves a useful purpose. Kuzniak v. Kosminski (1895) 107 Mich. 444, 65 N. W. 275 (building used as a woodshed).

3. In Massachusetts, chapter 348 of statutes of 1887: "Any fence or other structure in the nature of a fence, unnecessarily exceeding six feet in height maliciously erected or maintained for the purpose of annoying the owners or occupants of adjoining property, shall be deemed a private nuisance."

4. Rideout v. Knox (1889) 148 Mass. 368, 19 N. E. 390.

to which it is applied.[5] In this country, by the weight of authority, relief is given against such malicious interference upon the same principles that underlie the spite fence cases.[6]

§ 210. Joint actors—independent actors.

Where a nuisance is caused by several persons intentionally cooperating, each is liable for all the damage done and they may be sued separately or together either at law or in equity. Where, however, the nuisance is caused by several persons acting independently of each other, each is liable at law only for his share of the damage,[1] and apparently each should be sued separately.[2] And this liability exists, even tho the separate act of each one did not amount to a nuisance;[3] in this latter

5. Acton v. Blundall (1843) 7 M. & W. 324; 9 Col. Law Rev. 543.

6. Chesley v. King (1882) 74 Me. 164. See *contra*, Ellis v. Duncan (1855) 21 Barb. (N. Y.) 230; 9 Col. Law Rev. 543, 12 *id.* 633, 634.

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1. Watson v. Colusa-Parrott Co. (1904) 31 Mont. 513, 79 Pac. 14, defendant's smelting plant along with those of several others polluted the water and thus injured the plaintiff, a lower riparian proprietor. As the court pointed out, the difficulty of apportionment was no defence whatever to an action at law.

2. Watson v. Colusa Parrott Co., *supra*.

3. Thorpe v. Brumfitt (1873) 8 Ch. App. 650: "Then it was said that the plaintiff alleges an obstruction caused by several persons acting independently of each other, and does not show what share each had in causing it. It is probably impossible for a person in the plaintiff's position to show this. Nor do I think it necessary that he should show it. The amount of obstruction caused by any one of them might not, if it stood alone, be sufficient to give any ground of complaint, tho the amount caused by them all may be a serious injury. Suppose one person leaves a wheelbarrow standing on the way; that may cause no appreciable inconvenience, but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defense to any one person among the hundred to say that what he did causes of itself no damage to the complainant." See also Lambton v. Mellish (1894) 3 Ch. 163; 4 Col. Law Rev. 367.

situation, however, it has been held that the actors must be sued jointly and not separately.[4]

In any case where the defendants are liable to be sued jointly at law, there is, of course, no difficulty about joining them in a suit for an injunction.[5] If they are liable only to separate suits at law, they are subject to separate suits in equity;[6] but apparently the plaintiff may, if he prefers, join the independent actors in one suit, jurisdiction being usually placed upon the ground of avoiding a multiplicity of suits.[7]

§ 211. Whether issue at law must first be directed.

As already pointed out,[1] the early rule was that before a plaintiff could get a perpetual injunction against a trespass he must first establish his right at law if there was a dispute in regard to it.[2] This rule was later abolished in England and modified in this country; but it apparently has not disappeared tho the reasons for its existence no longer prevail.[3] The early rule[4] requiring that in suits to enjoin a nuisance an issue be first directed to try the question whether the nuisance alleged was in fact[5] such, has had much the same de-

4. Hillman v. Newington (1880) 57 Cal. 56, diversion of water by several upper proprietors so that the aggregate diversion caused a nuisance.

5. Hillman v. Newington *supra.*

6. Lambton v. Mellish *supra.* The English practice seems to be to bring separate suits and have them tried together. See 7 Col Law Rev. 57, 59.

7. See Warren v. Parkhurst (1906) 186 N. Y. 45, 78 N. E. 579; 7 Col. Law Rev. 57. And see *post* Chap. X, Bills of Peace.

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1. See *ante* § 192.

2. See *ante* § 193

3. See *ante* § 192.

4. Weller v. Smeaton (1784) 1 Brown Ch. 572, 1 Ames Eq. Cas. 554; Elmhurst v. Spencer (1849) 2 MacN. & G. 45. But see Bush v. Western (1720) Precedents in Ch. 530, 1 Ames Eq. Cas. 553.

5. Since in the narrow sense a nuisance does not involve any violation of the plaintiff's possession questions of the plaintiff's title are

velopment.[6] Unless the rule has been definitely repudiated by judicial decision, it should be abrogated by statute.[7]

§ 212. Balance of convenience—preliminary injunctions.

Where a preliminary injunction is sought against a nuisance it is well settled that in deciding whether or not to give it the court will balance the inconvenience to the defendant if relief should be given against the inconvenience to the plaintiff if relief should be denied. As was observed in Crowder v. Tinkler,[1] "great caution is required in granting an injunction of this nature where the effect will be to stop a large concern in a lucrative trade."[2] And where the decree sought is

not raised; in this respect a suit to restrain a nuisance resembles a suit to stay waste rather than a suit to enjoin a trespass; hence as a matter of logic one might have expected that there would be no requirement of directing an issue at law in suits to enjoin a nuisance just as there is no such requirement in suits to stay waste. But the jurisdiction of equity over nuisance is of a later development than that over waste and in the meantime the rule in trespass cases had grown up; and since nuisance is superficially more like trespass than waste it is not surprising that the trespass rule should be adopted. See 22 Harv. Law Rev. 65 reviewing 56 U. of Pa. Law Rev. 290-315: "Injunctions against Nuisances and the Rule Requiring the Plaintiff to Establish his Right at law."

6. At the present time the rule does not apply where the alleged nuisance is clearly shown; Turner v. Mirfield (1865) 34 Beav. 390, 1 Ames Eq. Cas. 409. Where the court does direct an issue, it will usually give a temporary injunction to maintain the *status quo* till the issue is decided; Pollock v. Lester (1853) 11 Hare 266; Longwood Valley R. R. v. Baker (1876) 27 N. J. Eq. 166. In Soltau v. De Held (1851) 2 Simon [N. S.] 133 it was held that the defendant is not entitled to have an issue directed more than once; he can not, by reducing the amount of noise (bell ringing) entitle himself to insist upon having a jury determine whether the ringing bell is now a nuisance. For the present statutory rule in England see *ante* § 193, note 4.

7. See 56 U. of Pa. Law Rev. 290, 315.

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1. (1816) 19 Ves. 617, 1 Ames Eq. Cas. 555 (suit to prevent the defendants from using a new building as a powder magazine).

2. In Eaden v. Firth (1803) 1 H. & M. 573, 1 Ames Eq. Cas. 564, the court refused a preliminary injunction against the operation of a

affirmative rather than negative it is usually considered that still more caution should be used. In Herbert v. Penn. R. R. Co.,[3] the defendant railroad had made such a large embarkment on its own land as to cause irregular upheavals of the plaintiff's adjacent lot. The court refused a preliminary affirmative decree: "A mandatory injunction should be issued interlocutorily with hesitation and caution, and only in an extreme case where the law plainly does not afford an adequate remedy. It does not with certainty appear that further injury will result to the complainant from the embankment or the further filling upon it. . . . In such a condition . . . the court should not, by its mandatory injunction compel the defendant to expend thousands of dollars in destroying that which it has expended so much in building up, and under such circumstances the court should not, by its preventive injunction, stop the completion of a work upon which so much has been expended and which will be of as great public benefit as it appears this will be."[4]

large steam hammer: "The question is, whether the balance of convenience is in favor of or against the issue of an interlocutory injunction. If I found any real apprehension of serious and immediate injury to health or of any pressing character of the like nature (such as the cases of stench or of apprehended inundation), I would interfere to prevent such irreparable injury in the mean time; but in this case I see nothing except annoyance apprehended by the plaintiff; and I certainly think that on the question of balance of convenience I ought to refuse the injunction." See also Maloney v. Katzenstein (1909) 120 N. Y. Supp. 418 where such relief was refused because of the hardship it would cause to a defendant who had without objection carried on the alleged offensive business for nineteen years.

3. (1887) 43 N. J. Eq. 21, 10 Atl. 872.

4. See also Robinson v. Byron (1785) 1 Brown, Chanc. Cases, 588; Longwood Valley R. R. v. Baker (1876) 27 N. J. Eq. 166. In Hepburn v. Lordan (1865) 2 H. & M. 345 the defendant was compelled at once to remove some damp jute because of the slight cost of such removal compared with the enormous damage which the plaintiffs would suffer if a fire should be caused by its spontaneous combustion.

§ 213. Same—existence of nuisance.

Unless the plaintiff is complaining of an interference with what the law regards as a technical property right,[1] it is necessary to show substantial damage in order to prove a nuisance;[2] and unless the damage consists of a direct injury to property,[3] the question of the existence of a nuisance involves a consideration of the relative convenience of the plaintiff, the defendant and the public. The question has usually been raised in cases where the plaintiff has chosen to live in a community devoted largely to industry. In Gilbert v. Showerman[4] the plaintiff sought to enjoin the running of a flour mill near the building in which he lived. In denying an injunction Cooley, J. said: "The right to have such a business restrained is not absolute and unlimited, but is, and must be in the nature of things, subject to reasonable limitations which have regard to the rights of others not less than to the general public

1. See *ante* § 206.

2. See *ante* § 205.

3. St. Helen's Smelting Co. v. Tipping (1865) 11 H. L. C. 642: "It is a very desirable thing to mark the difference between an action brought for a nuisance upon the ground that the alleged nuisance produces material injury to the property, and an action brought for a nuisance on the ground that the thing alleged to be a nuisance is productive of sensible personal discomfort. With regard to the latter, namely, the personal inconvenience and interference with one's enjoyment, one's quiet, one's personal freedom, anything that discomposes or injuriously affects the senses or the nerves, whether that may or may not be denominated a nuisance must undoubtedly depend greatly on the circumstances of the place where the thing complained of actually occurs. If a man lives in a town, it is necessary that he should subject himself to the consequences of those operations of trade which may be carried on in his immediate locality, which are actually necessary for trade and commerce, and also for the enjoyment of property, and for the benefit of the inhabitants of the town and of the public at large. . . . But when an occupation, or business is a material injury to property, then there unquestionably arises a very different consideration." It must be confessed that it is not always easy to draw the distinction which the learned judge insists upon; see 7 Col. Law Rev. 550.

4. (1871) 23 Mich. 448.

welfare.[5] . . . The defendants are carrying on a business not calculated to be especially annoying, except to occupants of dwellings. They chose for its establishment a locality where all the buildings had been constructed for purposes other than for residence. Families, to some extent, occupied these buildings, but their occupation was secondary to the main object of their construction, and we must suppose that it was generally for reasons which precluded the choice of a more desirable neighborhood. . . . The complainant, having taken up his residence in a portion of the city mainly appropriated to business purposes, cannot complain of the establishment of any new business near him, provided such new business is not in itself objectionable as compared with those already established, and is carried on in a proper manner."[6]

5. Rushman v. Polsue and Alfieri (1906) 1 Ch. 234: "The views that the standard of what amount of freedom from smoke, smell and noise a man may reasonably expect will vary with the locality in which he dwells seems to me confirmed by the following passage in Lord Halsbury's judgment in Colls v. Home & Colonial Stores (1904) A. C. 179: "A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise as if he lived in the country, and distant from other dwellings, and yet an excess of smoke, smell and noise may give cause of action, but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action." Se 19 Harv. Law Rev. 474; 6 Col. Law Rev. 458.

6. A plaintiff who is compelled, because of comparative poverty, to live outside the purely residential districts, is not, however, deprived of all protection. In Ross v. Butler (1868) 19 N. J. Eq. 294 the plaintiff sought to enjoin the erection of a pottery to burn earthenware because it would produce large amounts of smoke and cinders; one defense was that the locality was occupied principally by mechanics and laborers who used their houses and lots for business purposes. In giving relief: "I find no authority that will warrant the position that the part of a town which is occupied by tradesmen and mechanics for residences and carrying on their trades and business, and which contains no elegant or costly dwellings, and is not inhabited by the wealthy and luxurious, is a proper and convenient place for carrying on business which renders the dwellings there uncomfortable to the owners and their families by offensive smells, smoke, cinders, or intolerable noises,

§ 214. Same—adequacy of damages.

Even tho the act complained of amounts to a nuisance so that damages are recoverable at law, an injunction is occasionally refused as a matter of discretion, taking into consideration the relative inconvenience suffered by giving or denying relief. In Swaine v. Great Northern Ry. Co.[1] the plaintiff asked an injunction against the defendant's leaving manure in stacks or in cars on their sidetrack close to the plaintiff's house. In remitting the plaintiff to his remedy at law: "It is not every case that the court will interfere by injunction. . . . Occurrences of nuisances, if temporary and occasional only, are not grounds for the interference of this court by injunction, except in extreme cases; there is not . . . here a sufficient case for such interference."[2]

§ 215. Same—perpetual injunction.

Where the act complained of is proved or admitted to be a nuisance and where furthermore, damages therefor are conceded to be inadequate, it would seem to follow logically that the plaintiff is entitled to a perpetual injunction as of right, regardless of any further question of balancing conveniences. This is probably the

even if the inhabitants themselves are artisans, who work at trades occasioning some degree of noise, smoke and cinders. . . . There is no principle . . . which should give protection to the large comforts and enjoyments with which the wealthy and luxurious are surrounded, and fail to secure to the artisan and laborer, and their families, the fewer and more restricted comforts which they enjoy."

1. (1864) 4 DeG., J. & S. 211, 1 Ames Eq. Cas. 569.

2. See also Cook v. Forbes (1869) 5 Eq. Cas. 166; Grotlich v. Klein & Cohn (1909) 32 O. Cir. Ct. 665 (injunction refused against the operation of hammers and heavy machinery). In Robinson v. Baugh (1875) 31 Mich. 290 the fact that the defendant's blacksmith shop was on leased ground under a short term and the machinery was easily removable made it easier for the court to give equitable relief.

prevailing rule.[1] But in some jurisdictions courts have refused injunctions in such cases because of the comparatively great hardship on the defendant if an injunction were granted, especially if there would also result hardship to the public. In Richards' Appeal[2] the plaintiff sought to enjoin the defendants from using soft coal in their puddling furnaces because the smoke discolored the plaintiff's fabrics in his cotton factory, and rendered his residence uncomfortable. The defendant's works had cost over half a million dollars, nearly a thousand persons were employed; it was practically impossible to run their furnaces without soft coal and no way had yet been found of avoiding the escape of smoke. The court denied the relief sought: "Especially should the injunction be refused if it be very certain that a greater injury would ensue by enjoining than would by a refusal to enjoin. . . . Hence the chancellor will consider whether he would not do a greater injury by enjoining than would result from refusing and leaving the party to his redress at the hands of a court and jury."[3]

1. Broadbent v. Imperial Gas Co. (1856) 7 DeG., M. & G. 436, 462: "The present is not a case in which this court can go into the question of convenience or inconvenience, and say where a party is substantially damaged, that he can only be compensated by bringing an action *toties quoties*. That would be a disgraceful state of the law; and I quite agree with the Vice-Chancellor, in holding that in such a case this court must issue an injunction, whatever may be the consequences with regard to the lighting of the parishes and districts which this company supplies with gas." See also Hennesy v. Carmony (1892) 50 N. J. Eq. 616, 25 Atl., 374, 1 Ames Eq. Cas. 578; Whalen v. Union Bag & Paper Co. (1913) 208 N. Y. 1, 101 N. E. 805; 13 Col. Law Rev. 635; 14 Harv. Law Rev. 149; 22 *id.* 458; 18 *id.* 596, 613; 25 *id.* 474.

2. (1868) 57 Pa. 105, 1 Ames Eq. Cas. 574.

3. In Daniels v. Keokuk Water Works (1883) 61 Iowa 549, 16 N. W. 705, 1 Ames Eq. Cas. 585, emphasis was laid upon the public inconvenience which would result from an injunction. For other cases denying an injunction because of the "balance of convenience" doctrine, see 14 Harv. Law Rev. 458, 623, 22 *id.* 596, 613, criticising Bliss v. Anaconda Mining Co. (1908) 167 Fed. 342; 22 Harv. Law Rev. 61, criticising Somerset Water etc. Co. v. Hyde (1908) 129

The criticism of the prevailing view is that it allows the plaintiff to charge the defendant an exorbitant price for his property.[4] Unless, however, the plaintiff has bought the property with that as his sole motive, this is considered as one of the legitimate incidents of ownership.[5] And the defendant can usually protect himself at the outset by buying up sufficient land to prevent the question from being raised.[6] The result of the minority holding is that the plaintiff is remitted to his legal remedy; if he recovers only for damages down to the date of bringing his action, he will be compelled to sue just before the close of each statutory period[7] in order to prevent the acquisition of an easement; if he recovers prospective damages, the defendant acquires by the judgment against him such an easement at once.

Ky. 402, 111 S. W. 1105; 57 U. of Pa. Law Rev. 396, critising McCarthy v. Bunker Hill etc. Co. (1908) 164 Fed. 927. In City of Wheeling v. Natural Gas Co. (1914) 74 W. Va. 372, 81 S. E. 1067 the court refused to enjoin a gas company from supplying gas in violation of its franchise because of the inconvenience it would cause the public. 28 Harv. Law. Rev. 110. And the doctrine has occasionally been applied in trespass cases; see *ante* § 196; 28 Harv. Law Rev. 209.

4. See 22 Harv. Law Rev. 596, 597.

5. In Edwards v. Allouez Mining Co. (1878) 38 Mich. 46, 1 Ames Eq. Cas. 608 the defendants in 1874 had erected a copper stamp mill at a cost of $60,000. As a result of its operations, large quantities of sand were carried down stream and deposited on bottom lands below; it was impossible to run at a profit unless they were allowed to do this. In 1875 the plaintiff bought the land below, not for use, but as a matter of speculation expecting to compel the defendants to pay a large price; for this reason an injunction was refused, and the plaintiff remitted to his rights at law. But see Cowper v. Laidler (1903) 2 Ch. 337, where the plaintiff's motive in purchasing was held no bar in a case of disturbance of an easement of light and air.

6. See 14 Harv. Law Rev. 458, 459.

7. See *ante* § 195. In Attorney General v. Council and Borough of Birmingham (1858) 4 K. & J. 528, 540, the court seemed to think that a plaintiff "would be obliged to being a series of actions one every day of his life." There seems to be no sound basis for such a suggestion.

This in substance allows the defendant to take the plaintiff's property by a sort of private eminent domain;[8] and while it can not be plausibly argued that the refusal of a court of equity to grant an injunction is a violation of the fifth and fourteenth amendments to the United States Constitutions which impliedly prohibit either the Federal or the State government from the taking of private property for private use even with compensation,[9] it is inconsistent with the spirit of these amendments[10] unless the public interest in the defendant's enterprise is so great as to make it in substance a taking for a public use.[11]

8. See 25 Harv. Law Rev. 474.

9. *Quaere* as to whether legislation, which gives equity courts power to award damages in lieu of an injunction in order to avoid the necessity of the plaintiff's suing at law, is a violation of the letter of the amendments. See Hennesy v. Carmony (1892) 50 N. J. Eq. 616, 1 Ames Eq. Cas. 578: "And of the English cases it is proper further to observe that some of them gave damages instead of an injunction, under the authority of the acts of Parliament for that purpose, called Lord Cairns and Sir John Rolt's acts. The giving of damages for continuing nuisances is quite within the omnipotent power of Parliament, which is competent to take private property for private purposes. In this country, under our constitutional system, that course is forbidden."

10. See 13 Col. Law Rev. 635, 636: "The result of the denial of an injunction in such cases is the same whether the plaintiff is driven to pursue his remedy at law, or whether the legislature vests in the courts the power to exercise discretion in awarding damages instead of an injunction. It results in a forced sale of individual rights at private valuation."

11 It has been suggested that if there is such a great public interest the proper course is to require the defendant to make the proper constitutional condemnation. See 12 Col. Law Rev. 635, 637; 57 U. of Pa. Law Rev. 396, 398; 22 Harv. Law Rev. 596, 597. But under the rather restricted notion of what constitutes a public purpose under the amendments, it is not clear that a legislature may authorize large private industrial plants to take property by eminent domain. The best solution to the whole difficulty would be to liberalize and broaden our definition of public purpose so that the legislature may authorize such proceedings. This would approximate the situation in this country to that in England where Parliament may even authorize the taking of private property for a purely prvate use.

E. Disturbance of Private Easements.

§ 216. Private easements distinguished from natural rights—remedies.

A private easement has been defined[1] as "a right in one person, created by grant or its equivalent, to do certain acts on another's land, or to compel such other to refrain from doing certain acts thereon, the right generally existing as an accessory to the ownership of neighboring land, and for its benefit." Easements differ from natural rights in that they are created separately[2] as distinct subjects of property, while natural rights are mere incidents to the ownership of land. For a disturbance or interference with the proper exercise of an easement,[3] either by the owner of the servient tenement or by a third person, the common law remedy[4] is an action on the case[5] for damages. Where this is not adequate equity grants relief by either a negative or affirmative decree.

In most of the cases[6] in which equitable relief has been granted the easement disturbed has been either one of light and air, right of way or right of access to a public way.

1. Tiffany, Real Property § 304.

2. Either by voluntary act of the parties or by prescription.

3. The disturbance of a private easement is frequently referred to as a private nuisance; see 9 Ill. Law Rev. 278-281; Morgan v. Boyes (1875) 65 Me. 124.

4. The common law also allowed the aggrieved person to abate the obstruction; Sargent v. Hubbard (1869) 102 Mass. 380 (cutting branch that obstructed private way); but unnecessary damages must be avoided; Joyce v. Conlin (1888) 72 Wis. 607, 40 N. W. 212. As to abatement of private nuisance, see *ante* § 204, note 5.

5. Trespass does not lie because the occupier of the dominant tenement was not considered as being *possessed* of the easement.

6. Tiffany, Real Property § 304 names the following easements as most important: "rights in extension or diminution of natural rights in regard to air, water, and support; rights of way over another's land; rights as to the use of a party wall in part or

§ 217. Light and air.

The mere fact that an action at law will lie for interference with an easement of light and air[1] is not a sufficient reason for an injunction.[2] On the other hand, the fact that the obstruction does not interfere with the plaintiff's present use of the premises for which strong light is not required is no defense to a suit for an injunction if the threatened obstruction would substantially interfere with any lawful business.[3] Nor is it material that the plaintiff bought the property as an investment without intending to occupy it himself.[4] But if the obstruction is temporary and easily removable, and the premises are occupied by tenants, the landlord may fail to get an injunction because there is no damage to his interest in the land, tho the tenants

wholly on another's land; rights to have light and air pass to one's windows without obstruction; pew rights in churches and burial rights in cemetries."

1. Easements of light and air are quite common in England because they can there be acquired by prescription. This part of the English common law was rejected in America as inapplicable to a new country, and easements of light and air by grant are comparatively rare.

2. Attorney General v. Nichol (1809) 16 Vesey 338, 1 Ames Eq. Cas. 534 (affidavit did not state the amount which the plaintiff's windows would be darkened by the obstruction). See also Jackson v. Duke of Newcastle (1864) 3 DeG., J. & S. 275. In Martin v. Price (1893) 1 Ch. 276, 1 Ames Eq. Cas. 537 the defendant had pulled down a house and was in the process of erecting a new building some twenty-five feet higher. Since this would cause the plaintiff substantial deprivation of light he was given an injunction. In Home & Colonial Stores, L't'd, v. Colls (1902) 1 Ch. D. 302 the "true rule of law" was stated to be: "If ancient lights are interfered with substantially, and real damage thereby ensues to tenant or owner, then that tenant or owner is entitled to relief."

3. Yates v. Jack (1866) 1 Ch. App. 295, 1 Ames Eq. Cas. 541, *semble*. See 4 Harv. Law Rev. 193.

4. Wilson v. Townsend (1860) 1 Drewry & Smale 324, 1 Ames Eq. Cas. 539.

themselves would have been entitled to equitable relief.[5]

There is, of course, more reluctance in granting affirmative than in granting negative decrees; but affirmative relief has been frequently granted not only on the final decree[6] but also on motion.[7] If after notice that an injunction will be sought the defendant has continued erecting the obstruction, such continuance will not place him in any better situation with respect to equitable relief.[8]

§ 218. Right of way.

One who has a private right of way is entitled to equitable relief against either an actual[1] or threatened

5. Jones v. Chappell (1875) 20 Eq. Cas. 539. The rule is similar in case of private nuisance; Simpson v. Savage (1856) 1 C. B. [N. S.] 347.

6. Smith v. Smith (1875) 20 Eq. 500, 1 Ames Eq. Cas. 543 (defendant had torn down an old wall nine feet high and erected a new one twenty-six feet high.) In Calcraft v. Thompson (1867) 15 Weekly Rep. 387 affirmative relief was refused because the plaintiff had failed to show that there would be a substantial deprivation of light. In Brande v. Grace (1891) 154 Mass. 210, 31 N. E. 633, the plaintiffs had sought to enjoin their lessor from building another room in front of the room leased and occupied by the plaintiffs as a dental office; the appeal court held that the lower court should have given the injunction but that since the work had been completed and the plaintiff's lease would soon expire, their remedy should now be confined to damages.

7. Ryder v. Bentham (1750) 1 Ves. Sr. 543, 1 Ames Eq. Cas. 545 (scaffold ordered removed).

8. Smith v. Day (1880) 13 Ch. D. 651; Van Joel v. Hornsey (1895) 2 Ch. 774, 1 Ames Eq. Cas. 546: "The court will not allow itself to be imposed upon by a proceeding of that kind." See also Daniel v. Ferguson (1891) 2 Ch. 27.

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1. Stallard v. Cushing (1888) 76 Cal. 472, 18 Pac. 427 (stairway placed by defendant in plaintiff's private alley); Shivers v. Shivers (1880) 32 N. J. Eq. 578 (gate placed by defendant across plaintiff's right of way obtained by prescription). Most of the cases are of affirmative decrees against actual obstructions. In jurisdictions which reject the doctrine of balance of convenience (see *ante* § 215) the plaintiff is entitled to an affirmative decree

interference therewith; and where the circumstances of the case require it, an affirmative decree will be given on motion.[2]

Where the obstruction has been caused independently by several defendants the plaintiff is entitled to a decree against all even tho the share contributed by any one would not have been enough by itself to warrant either an action at law or an equitable decree.[3]

In some jurisdictions if the defendant disputes the plaintiff's right and raises thereby a reasonable doubt, an issue at law will first be directed to determine the existence of the easement unless there is danger of serious injury.[4] As already explained, the real reasons for such a requirement have disappeared and the requirement itself should be abolished.[5]

A reversioner is entitled to equitable relief where the obstruction causes a substantial injury to the reversioner's interest in the land.[6]

even tho it will cause great expense to the defendant; Krehl v. Burrell (1878) 7 Ch. D. 551 (court ordered removal of large building obstructing passage way to the back of plaintiff's house). Continuing to build after notice of the plaintiff's claim does not place the defendant in any better situation with reference to equitable relief against him. Tucker v. Howard (1880) 129 Mass. 361, 1 Ames Eq. Cas. 548.

2. Hodge v. Giese (1887) 43 N. J. Eq. 342, 11 Atl. 484 (decree required defendant to allow the plaintiff to pass through the defendant's barber shop to the furnace which supplied heat to the plaintiff's rooms on the two floors above).

3. Thorpe v. Brumfitt (1873) 8 Ch. App. 650, 1 Ames Eq. Cas. 547 (plaintiff's right of way to his inn obstructed by horses and wagons belonging to several defendants). See *ante* § 210.

4. Hart v. Leonard (1880) 42 N. J. Eq. 416, 1 Ames Eq. Cas. 549. See also 10 Col. Law Rev. 355.

5. See *ante* §§ 192, 193 and 211.

6. Webb v. Jones (1909) 163 Ala. 637, 50 So. 887; 10 Col. Law Rev. 355, 364 (right of way to plaintiff's farm obstructed by wire fence; the farm was rented to a tenant but the plaintiff's free access to the farm was interfered with and the market value of the property diminished thereby).

§ 219. Land occupier's right of access to public way.

If the owner of land adjoining a public way owns to the middle of the way, one in possession of the land may maintain an action of trespass against the use of that part of the way in a manner not authorized by the public easement, and if trespass is not an adequate remedy, he may get relief in equity.[1] But if the fee of the way is in the municipality, the adjoining land occupier has only an easement of access to the way. If this easement is obstructed he is entitled to damages in an action on the case and if damages are not adequate, he is entitled to equitable relief. In West v. Brown[2] the defendant had been allowing his hacks to stand for an unreasonable length of time in front of the plaintiff's hotel, thus obstructing the right of access of the plaintiff and his guests, to the injury of the plaintiff's business.

1. See *ante* §§ 195, 196. In American Mfg. Co. v. Lindgren (1912) 48 N. Y. L. J. 19 the defendant had been making speeches in front of the plaintiff's factory, vilifying the owners and urging the workers to strike. The plaintiff could have brought trespass because they owned the fee of the street but such a remedy would have been obviously inadequate and therefore it was held proper to issue an injunction.

2. (1897) 114 Ala. 118, 21 So. Rep. 452, 11 Harv. Law Rev. 130. See also Ackerman v. True (1902) 71 App. Div. 413, where the defendant was compelled to remove some houses which so projected into the street as to interfere with plaintiff's access to an adjoining lot. 2 Col. Law Rev. 559. There is a tendency to confuse this right of access with the rather similar right of individuals to get relief against the obstruction of a public easement. In Callanan v. Gilman (1887) 107 N. Y. 310, 14 N. E. 264, the defendant had so obstructed the sidewalk in front of the plaintiff's store as to interfere with the plaintiff's trade. In very properly giving relief the court speaks of the defendant's act as a public nuisance tho obviously the plaintiff's injury is due to blocking his right of egress and ingress to his store. See also 28 Harv. Law Rev. 499, 500, 6 Col. Law Rev. 203.

Damages being obviously inadequate,[3] the plaintiff was given a decree.[4]

F. Obstruction of Public Rights.

§ 220. Remedy of private individual at law.

In order that a private individual may recover at law for the disturbance or obstruction of a public right,[1] it is necessary that he should have suffered actual damage thereby;[2] furthermore, in most jurisdictions the rule is laid down that the damage thus suffered must be "peculiar to him and different in kind from that to which the public is subjected."[3] This additional re-

3. In Herbert v. Pennsylvania R. R. Co. (1887) 43 N. J. Eq. 21, 10 Atl. 872, the defendant had made a large embankment on its own land which caused an irregular upheaval of the plaintiff's nearby lot and obstructed access. Tho damages were not adequate relief was denied on the ground that the balance of convenience was against it. See *ante* § 215.

4. Apparently the land occupier not only has a right of access to the adjacent street but also has a right to an unobstructed view of the street. Cobb v. Saxby (1914) 3 K. B. 322 (defendant's sign board projected over the street in such a manner as to obscure the view from the plaintiff's side wall, which he used for advertising). In 28 Harv. Law Rev. 499 it is suggested that such a right might be called the right of publicity and that it is more analogous to an easement of light and air than to an easement of access because only a substantial obstruction of the view should be actionable.

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1. This is practically always referred to as a public nuisance. Tho the remedies of the public are the same as in case of public nuisances proper, the difference from the standpoint of the individual is such that a separate classification and treatment was considered desirable to avoid the confusion which has crept into some of the decisions. See *post* § 225.

2. This seems to be assumed in all the cases, including those that reject the peculiar damage requirement; Carver v. San Pedro etc. R. R. (1906) 151 Fed. 334. See 22 Harv. Law Rev. 137, 148.

3. Harniss et al. v. Bulpitt (1905) 1 Cal. App. 140, 81 Pac. 1022; Adler v. Metropolitan Elev. Ry. Co. (1893) 138 N. Y. 178, 33 N. E. 935. See also 11 Harv. Law Rev. 66 discussing Morris v. Graham (1897) 16 Wash. 343, 47 Pac. 752 (plaintiff suffered peculiar

quirement has, however, very slight, if any, justification,[4] and has been severly criticised.[5]

§ 221. Remedy of private individual in equity.

Apparently the individual is not entitled to a remedy in equity unless he could have recovered at law.[1] Whether it is sufficient in all cases that he could have recovered at law in order to be entitled to equitable relief does not seem clear, but it would seem that it is probably enough, especially in those jurisdictions that hold the peculiar damage rule.[2]

damage in his occupation as fisherman). In Anglo-Algerian S. S. Co. v. Houlder Line (1908) 1 K. B. 659 the plaintiff sought to recover for delay due to negligently damaging a dock which was owned by a corporation but which was by statute open to all upon payment of dock rates. The court refused to follow the analogy of the obstruction of a public right and denied recovery; see 21 Harv. Law Rev. 544. In Wilkinson etc. Co. v. McIlquam (1905) 14 Wyo. 209, 83 Pac. 304, the defendant excluded the plaintiff from using government lands over which the public had a right to use as a common for pasturage of stock; the plaintiff failed to get relief because he suffered no peculiar damage; 19 Harv. Law Rev. 540.

4. Coke, First Institute, 56a suggested that to allow any one who was damaged to sue at law would lead to a multiplicity of actions and clog the courts. See 15 Col. Law Rev. 5-7 for an answer to this.

5. For an exhaustive criticism see 15 Col. Law Rev. 1-23; 142-165; Obstruction to Public Passage, by Professor Jeremiah Smith. See also 12 Harv. Law Rev. 358 approving Piscataqua Navigation Co. v. New York etc., R. R. Co. (1898) 89 Fed. 362. The right to abate seems to be enjoyed by any one having occasion to make use of the public right; James v. Hayward (1631) Croke, Charles, 184 (removing gate across public way); or by one who suffers substantial damage. See Gates v. Blincoe (1834) 2 Dana (Ky.) 158, 26 Am. Dec. 440.

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1. Fessler v. Town of Union (1903) 67 N. J. Eq. 14, 56 Atl. 272. See also 7 Col. Law Rev. 364; 11 Harv. Law Rev. 66; Corning v. Lowerre (1822) 6 Johnson's Ch. 439.

2. The decisions seem to take for granted that an individual entitled to an action is entitled to equitable relief. That a plain-

§ 222. Remedy of the public—purprestures.

The remedy of the public in case of an obstruction of a public right is by indictment or injunction at the suit of the Attorney General—the same as in the case of a public nuisance proper.[1]

Where the obstruction of a public right takes the form of a permanent structure, such an encroachment is frequently called a purpresture. If a purpresture causes damage it is treated like any other obstruction of a public right.[2] Where no damage is caused there is a

tiff may have an injunction where damages would be inadequate is certainly true. See Georgetown v. Alexandria Canal Co. (1838) 12 Peters, 91, 99.

1. See *post* § 224. In Attorney General v. Sheffield Gas Consumers Co. (1852) 3 DeGex, McN. & G. 304 an injunction against laying gas pipes in a highway was denied because the damage was slight. In Coosaw Mining Co. v. South Carolina (1891) 144 U. S. 550 the state succeeded in preventing the removal of phosphate rock from the bed of the Coosaw River. In State v. Ohio Oil Co. (1897) 150 Ind. 21, 49 N. E. 809, the state was given an injunction against the waste of natural gas on the ground that although the defendant's property interest in the gas was unassailable, there was a public interest against the wastage of energy which was entitled to protection. This is somewhat analogous to the obstruction of a public right.

2. Attorney General v. Richards (1795) 2 Anstruther 603, 1 Ames Eq. Cas. 615 (defendant had erected a wharf, docks and other buildings between high and low water mark, interfering with navigation and causing the harbor to fill with mud). In Attorney General v. Williams (1899) 174 Mass. 476, 55 N. E. 77, 1 Ames Eq. Cas. 619, the defendant had erected a building in Copley Square, Boston, above the limit of height prescribed by statute which was interpreted as giving rights to the public similar to rights in highways and navigable streams. On writ of error the decision was affirmed in (1899) 177 U. S. 190. In Fessler v. Town of Union (1903) 67 N. J. Eq. 14, 56 Atl. 272, equitable relief was given to a private individual against the erection of a fire bell in the public square because the ringing of the bell would damage the plaintiff's near-by property to a greater degree than it would the property farther away.

conflict of authority as to whether the State may require its removal.[3]

G. Public Nuisance.

§ 223. Definition.

A private nuisance[1] which affects a considerable portion[2] of the public becomes thereby a public nuisance.[3] The most common illustrations are nuisances which affect the health[4] and comfort[5] of the community. In recent years there has been legislation in some states in protection of public morals declaring certain things to be public nuisances which would be neither private nor

3. In some jurisdictions the rule is that a purpresture is not removable until it causes damage; People v. Mould (1899) 55 N. Y. Supp. 453 (wharf in the Hudson River); People *ex rel.* v. Davidson (1866) 30 Cal. 799 (wharf in San Francisco Bay); Attorney General v. United Kingdom Electric Telegraph Co. (1861) 30 Beav. 287 (telegraph wires in highway.) In other jurisdictions a purpresture is removable at any time. Attorney General v. Smith (1901) 109 Wis. 532, 85 N. W. 512 (pier in shallow waters of navigable lake). See 1 Col. Law Rev. 408.

1. See *ante* § 203.

2. Bell ringing may be a private nuisance to those living very close but not a public nuisance because to those farther away the ringing of the bells is pleasing instead of annoying. Soltau v. De Held (1851) 2 Sim. [N. S.] 133.

3. In this subdivision will be considered public nuisances in the narrow sense, not including obstructions of a public right which are discussed *ante* §§ 220-222.

4. Attorney General v. Hunter (1826) 1 Devereux (N. C.) 12, 1 Ames Eq. Cas. 621 (mill pond); Attorney General v. Manchester (1893) 2 Ch. Div. 87 (small pox hospital). In Everett v. Paschall (1910) 61 Wash. 47, 111 Pac. 879 a tuberculosis sanatorium was held to be a nuisance tho there was no actual danger of infection. For a criticism of the decision see 24 Harv. Law Rev. 407, 11 Col. Law Rev. 292.

5. Duke of Grafton v. Hilliard (1736) 1 Ambler 160, note (smoke from brick kiln); Cronin v. Bloemecke (1899) 58 N. J. Eq. 313, 43 Atl. 605, 1 Ames Eq. Cas. 560 (noise of disorderly crowds attracted by baseball game).

public nuisances apart from such statute.[6] There has been a tendency to recognize the protection of the public morals as a legitimate field for equitable interference without a statute,[7] and also a slight tendency thus to recognize public aesthetics.[8]

§ 224. Remedy of the public.

At common law the remedy of the public is by indictment.[1] The equitable remedy is sought either by the state[2] or by a municipality[3] to which such power has been delegated. If the municipality is itself guilty of maintaining a public nuisance, the state[4] is obviously the proper party to ask for relief.

6. Most of this legislation has been aimed at saloons. See Littleton v. Fritz (1885) 65 Iowa 488, 22 N. W. 641, 1 Ames Eq. Cas. 31, holding such a statute constitutional. It has been held that such a statute does not authorize a private individual to abate; State v. Stark (1901) 63 Kan. 529, 66 Pac. 243; 15 Harv. Law Rev. 415.

7. These are chiefly cases of injunctions against allowing prize fights to be held; Attorney General v. Fitzsimmons (Ark., 1896) 35 American Law Register 100, 1 Ames Eq. Cas. 622; Com'th v. McGovern (1903) 116 Ky. 212, 75 S. W. 261, 66 L. R. A. 280.

8. See 20 Harv. Law Rev. 35-45; 8 Col. Law Rev. 226; 21 Harv. Law Rev. 445.

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1. As a matter of substantive law a public nuisance is usually not a crime in the narrow sense but a public tort. But the state has found it more convenient to use the machinery of the criminal law than to bring an action on the case for damages. Where a public nuisance involves a breach of the peace—as for example, a prize fight—there is a crime in the narrow sense and hence in Attorney General v. Fitzsimmons *supra* no injunction was issued against the principals in the prize fight on the ground that the normal remedy against them was by indictment for a misdemeanor.

2. Usually through a bill filed by the Attorney General.

3. See 23 Harv. Law Rev. 645; 26 *id.* 371.

4. Com'th of Pennsylvania v. East Washington (1911) 60 Pittsburg Leg. J. 300 (city sewage plant a public nuisance.) In Georgia v. Tennessee Copper Co. (1907) 206 U. S. 230 the State of Georgia, suing in the U. S. Supreme Court was held entitled to an injunction against the discharge of noxious gases by a Tennessee cor-

§.225. Remedy of private individual.

The fact that a private nuisance is also a public nuisance because it affects a large portion of the public should not in any way diminish what would otherwise be the rights and remedies of the private individual and this seems to be the prevailing view.[1] In a few cases, however, the confusion[2] resulting from calling the obstruction of a public right a public nuisance has caused the courts to require that in order to get relief from a public nuisance in the narrow sense the private individual must show peculiar damage not suffered by the public in general.[3]

H. Common Law Copyright—Statutory Monopolies.

§ 226. Common law copyright.

For at least a hundred and fifty years[1] the common law has recognized a right in the author of a literary production to keep it entirely secret or to determine at what time and in what manner it should be published. This right to control publication is usually called com-

poration across the state line; tho damages might have been an adequate remedy for a private person, a state was not required to part with its quasi sovereign rights for damages. See 21 Harv. Law Rev. 132, 144, 7 Col. Law Rev. 617.

1. Cronin v. Bloemecke (1899) 58 N. J. Eq. 313, 1 Ames Eq. Cas. 560 (base ball game). See also Bellamy v. Wells (1890) L. J. Ch. D. 156 (disorderly boxing contests).

2. For a clear statement of the distinction see Wesson v. Washburn Iron Co. (1860) 13 Allen (Mass.) 95, 90 Am. Dec. 181.

3. Cranford v. Tyrrell (1891) 128 N. Y. 341 (bawdy house). See also Myers v. Malcolm (1844) 6 Hill (N. Y.) 292, 41 Am. Dec. 744 (action on the case for explosion of quantity of gunpowder kept in a village). Even in cases of the obstruction of a public right, the requirement of peculiar damage has been criticised. See *ante* § 220.

1. Tonson v. Collins (1760) 1 W. Bl. 301; 12 Harv. Law Rev. 51, 553-556.

mon law copyright.[2] It is frequently referred to as a property right,[3] but similar protection has been extended[4] to cases where the right was one of personality[5] rather than of property.

It is well settled that the right comes to an end as soon as the author publishes or dedicates[6] his pro-

2. See 12 Harv. Law Rev. 436. In Palmer v. De Witt (1872) 47 N. Y. 532 the court calls it a common law right of "first publication" or "copyright before publication."

3. Palmer v. DeWitt *supra;* Miller v. Taylor (1767) 4 Burr. 2303, 2379.

4. Protection has been given not only to practically all writings, —including unpublished dramatic works, Tompkins v. Halleck (1882) 133 Mass. 32; private letters, Gee v. Pritchard (1818) 2 Swanst. 403; and paintings, Werckmeister v. Springer Co. (1894) 63 Fed. 808—but also to the collection of news, National Telegraph News Co. v. Western Union Telegraph Co. (1902) 119 Fed. 294; to oral lectures, Abernethy v. Hutchinson (1825) 3 L. J. Ch. [O. S.] 209; and to photographs, Corliss v. Walker (1893) 57 Fed. 434; Pollard v. Photographic Co. (1889) 40 Ch. D. 345. In Haskins v. Ryan (1906) 71 N. J. Eq. 575, 64 Atl. Rep. 436, the plaintiff had formed a plan of organizing the various white lead companies into one. He communicated this to the defendant to secure funds from him to finance it. The defendant proceeded to carry out the plan, excluding the plaintiff from participating therein. The plaintiff asked for an accounting and share of the profits but relief was denied. The case was not analogous to common law copyright because it was the execution of the plan and not the publication of it that was potentially valuable; or to trademark (see *post* § 230) because the plan itself was not a commodity to be offered for sale to the public and the court was unwilling to recognize a property right in the mere idea. See 20 Harv. Law Rev. 143, 156. In Mansell v. Valley Printing Co. (1908) 1 Ch. 567 the plaintiff had several pictorial designs which he intended to copyright for use in advertising. X copied the designs and sold them to the defendant who used them without knowing their origin. The plaintiff was nevertheless held entitled to protection. In 21 Harv. Law Rev. 634 the case is criticised on the ground that it should have been treated like cases of trade secret. See *post*, § 229.

5. The right of the writer of a private letter to control its publication by the recipient is more properly classified as a personal right where the letter has no literary value. See Gee v. Pritchard (1818) 2 Swanst. 403; 4 Harv. Law Rev. 198-204.

6. Whether such publication or dedication has taken place seems to depend upon the subject matter involved. The delivery

duction to the public. After such dedication the only right, if any, of the author is that given by the copyright statutes.[7]

The common law remedy for a violation of this right is an action on the case for damages.[8] Where damages would be inadequate,[9] the plaintiff is entitled to equitable relief.[10]

§ 227. Patents.

The common law remedy for infringement of a patent right is an action on the case for damages. Unless the patent has expired or is about to expire,[1] the plain-

of a public lecture is not considered such a publication as to put an end to the right; Caird v. Sime (1887) 12 App. Cas. 326; neither is the private circulation of a book; Prince Albert v. Strange (1849) 1 Mac. & G. 24; nor the distribution of ticker news among customers; National etc. News Co. v. Western Union Telegraph Co. *supra;* 2 Col. Law Rev. 549, 560; 19 Harv. Law Rev. 65; nor, in the United States, the public rendition of a dramatic production; Tompkins v. Halleck, *supra*, 8 Harv. Law Rev. 280, 286. On the other hand, the exhibition of a painting in a public gallery has been held to terminate the producer's right; Pierce etc. Co. v. Werckmeister (1896) 72 Fed. 54, and so has the filing of an architect's plans with the city building department; Wright v. Eisle (1903) 83 N. Y. Supp. 887. See 17 Harv. Law Rev. 266, 280; 16 Harv. Law Rev. 226. In England, by statute, a dramatic production is held to be published on its first presentation and after such presentation it is of course too late to take out a statutory copyright; but such a presentation in England does not operate to forfeit common law copyright in the United States. Frohman v. Farris (1909) 238 Ill. 430, 87 N. E. 327.

7. See *post* § 228. After the expiration of the statutory copyright, the common law copyright does not revive; Donaldson v. Becket (1774) 4 Burr. 2408, 2417; Wheaton v. Peters (1834) 8 Pet. 591; see 27 Harv. Law Rev. 385.

8. Tonson v. Collins (1760) 1 W. Bl. 301.

9. Damages are usually inadequate because conjectural.

10. At the present time relief is practically always sought in equity, the plaintiff asking for an injunction and an accounting of the profits. Most of the cases cited *supra* are cases seeking equitable relief.

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1. In Bragg Mfg. Co. v. Hartford (1893) 56 Fed. 292 the bill was filed only four days before the expiration of the patent; the

tiff usually prefers and is entitled[2] to an injunction against the continuance of the infringement and an accounting of profits as incidental thereto.[3] Since the damage caused by the infringement may be much greater than the amount of profits made by the infringer, a plaintiff who is entitled to an injunction should be allowed to choose damages instead of profits, and this is now provided for by statute in England.[4]

There has been a tendency in doubtful cases to postpone the giving of equitable relief till after the plaintiff has established at law his legal right and the fact of infringement.[5] The doctrine of balance of convenience already discussed[6] has been applied to the giving of both temporary[7] and permanent[8] relief. Where a plaintiff has already succeeded in litigation

bill was held demurrable because it was impossible to give an injunction; see also 21 Harv. Law Rev. 544. But the mere fact that the patent expires before the suit is determined does not disentitle the plaintiff to an accounting for profits; Beedle v. Bennett, (1887) 122 U. S. 71. In McCreery Engineering Co. v. Mass. Fan Co. (1910) 180 Fed. 115 the plaintiff was refused an injunction against county commissioners for using a patent device on the ground that it would in substance be an injunction against the state, and was remitted to an action at law against the commissioners themselves; see 24 Harv. Law Rev. 155.

2. The remedy at law is usually inadequate because the amount of damage is conjectural; Reece Mach. Co. v. Earl & Wilson (1913) 205 Fed. 539.

3. The remedy of accounting for profits is not tort but quasi contract and therefore the suit is not abated by the death of the defendant; Head v. Porter (1895) 70 Fed. 498, 1 Ames Eq. Cas. 644.

4. Bells v. De Vitre (1864) 34 L. J. Ch. 289.

5. Stevens v. Keating (1847) 2 Phillips 333, 1 Ames Eq. Cas. 627. The historical reasons for this rule have already been discussed See *ante* §§ 192, 193. In England now by Rolt's Act 25 and 26 Vict. c. 42 such questions in patent cases must be tried in equity.

6. See *ante* §§ 212-215.

7. Standard Elevator Co. v. Crane Elevator Co. (1893) 56 Fed. 718, 1 Ames Eq. Cas. 633.

8. Bacon v. Jones (1839) 4 Mylne & Craig 433, 1 Ames Eq. Cas 634; McCrary v. Pa. Co. (1880) 5 Fed. 367.

against other infringers, he is entitled to a temporary injunction upon proving infringement by the defendant[9] unless the defendant is able to show new evidence of a conclusive character attacking the validity of the patent or to show that the former suit was collusive.[10]

That the plaintiff has made no use of his patent may bar him from getting a temporary injunction,[11] but is no bar to a permanent injunction.[12]

A plaintiff who has been guilty of acquiescence amounting to estoppel may be entirely barred from any equitable relief.[13] But mere delay without any element of estoppel will merely bar relief for such acts of infringement as happened longer than the statutory period before bringing suit.[14]

The mere fact that infringement ceased before the suit was begun is not a sufficient ground for refusing relief where it appears that further infringement is intended.[15]

9. Edison Elec. Light Co. v. Beacon Vacuum Pump etc. Co. (1893) 54 Fed. 678, 1 Ames Eq. Cas. 630.

10. Dickerson v. De la Vergne Co. (1888) 35 Fed. 143. See also Warner v. Bassett (1881) 7 Fed. 468 (previous judgment was by consent); and Bowers Co. v. N. Y. Co. (1896) 77 Fed. 980 (appeal taken on former judgment).

11. Plympton v. Malcomson (1875) 20 Eq. Cas. 37, 1 Ames Eq. Cas. 632.

12. Continental Paper Bag Co. v. Eastern Bag Co. (1906) 150 Fed. 741; 7 Col. Law Rev. 433. For a good adverse criticism of the decision on the ground that such a result is inconsistent with the spirit of the patent statutes see 20 Harv. Law Rev. 638. In England this point is taken care of by express statutory provision for compulsory licenses; Terrell, Patents, 4th edition 248.

13. Lane & Bodley Co. v. Locke (1893) 150 U. S. 193.

14. Ide v. Thorlicht (1902) 115 Fed. 137, 1 Ames Eq. Cas. 642.

15. Cayuta etc. Co. v. Kennedy etc. Co. (1903) 127 Fed. Rep. 355. In Butler v. Bull (1889) 28 Fed. 754 an injunction was given to a plaintiff before he had obtained a patent; for an adverse criticism see 3 Harv. Law Rev. 50. In Fuller v. Berger (1902) 120 Fed. 274, the plaintiff succeeded in getting an injunction tho his patented device was used to guard gambling machines; for an adverse criticism see 16 Harv. Law Rev. 444, 451.

A manufacturer of a component part of an article which he knows is to be used in infringing is liable as contributory infringer.[16]

§ 228. Statutory copyright.

The common law remedy for the infringement of statutory[1] copyright is an action on the case for damages. If this remedy would be inadequate equity will give an injunction[2] with an accounting for profits.[3] Generally speaking the rules applying to cases of infringement of patents apply here. In doubtful cases the plaintiff must usually first establish his case at law before getting relief in equity;[4] the doctrine of balance of convenience may prevent the giving of either temporary[5] or permanent[6] relief; and a plaintiff may be barred by acquiescence amounting to estoppel tho not by mere delay.[7]

16. Wallace v. Holmes (1871) 9 Blatchf. (U. S.) 65. For an adverse criticism of the contrary English view see 18 Harv. Law Rev. 151. On the extent of the doctrine of contributory infringement see 25 Harv. Law Rev. 641, 668, 12 Col. Law Rev. 564, discussing Henry v. A. B. Dick Co. (1912) 32 Sup. Ct. Rep. 364, which held valid a restriction in the sale of patented mimeographs that they be used only with supplies (ink etc.), of the patentee's production.

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1. For a discussion of common law copyright or the right of first publication, see *ante* § 226. Except dramatic productions which are held in the U. S. not to be published by public performances, it is difficult to make beneficial use of literary property except under the protection of a statutory copyright.

2. An injunction will not be given in a case where an action at law would not have lain; Walcot v. Walker (1802) 7 Ves. 1 (libellous publication).

3. In England by statute of 1858 a plaintiff who gets an injunction may choose damages rather than profits; Ager v. Peninsular Co. (1882) 20 Ch. D. 637.

4. Anonymous (1682) 1 Vernon 120, 1 Ames Eq. Cas. 650.

5. McNeill v. Williams (1847) 11 Jurist 345, 1 Ames Eq. Cas. 652.

6. Baily v. Taylor (1829) 1 Russell & Mylne 73, 1 Ames Eq. Cas. 654.

7. Hogg v. Scott (1874) 18 Eq. Cas. 444, 1 Ames Eq. Cas. 655.

I. Interference with Trade Interests—Fraud.

§ 229. Trade secrets.

An inventor has no absolute property in his invention; there is no common law patent[1] right to correspond to the common law copyright[2] in literary and similar productions. But if the defendant has contracted[3] not to disclose the inventor's secret, he is not only liable at law but equity will usually give specific performance of the contract[4] by enjoining the defendant from divulging the secret.[5] Equity will give similar relief against a defendant who has obtained the secret because of a fiduciary relationship[6] or by means of fraud.[7] Whether a *bona fide* purchaser from the wrongful procurer of the secret is protected is not clear, but the tendency seems to be to regard the plaintiff's right as equitable instead of legal and hence to protect such a purchaser.[8]

§ 230. Trade marks.

The right of a manufacturer or vendor so to identify his goods to the buying public by an exclusive trade

1. For a discussion of statutory patent rights see *ante* § 227.

2. See *ante* § 226.

3. Either with the inventor or his assignee. That the secret is assignable see Vickery v. Welch (1837) 19 Pick. (Mass.) 523.

4. Peabody v. Norfolk (1868) 98 Mass. 452. See also 19 Harv. Law Rev. 537.

5. The common law remedy is usually inadequate because the amount of damage is conjectural.

6. Eastman Kodak Co. v. Reichenbach (1894) 79 Hun. 183; 10 Col. Law Rev. 559-561, 11 Harv. Rev. 262, 272. The injunction will also be issued against the third person to whom the secret has been or is about to be divulged; 19 Harv. Law Rev. 537.

7. Tabor v. Hoffman (1889) 118 N. Y. 30, 23 N. E. 12 (defendant induced one of plaintiff's employees to make drawings of the plaintiff's unpatented pump).

8. Stewart v. Hook (1903) 118 Ga. 445, 45 S. E. 369, 17 Harv. Law Rev. 206.

mark[1] is now[2] well recognized both at law and in equity. The right is usually considered to be a property[3] right and is enforcible as to future conduct even against a *bona fide* infringer.[4] In order to have such recognition, however, words in common use, such as geographical[5] and proper[6] names and descriptive words[7] cannot be used. The right is not assignable apart from the business of the manufacturer or vendor,[8] because such an assignment would work a fraud on the public.[9]

1. See Browne, Trade Marks § 87: "The mark may consist in the name of the owner, whether manufacturer or vendor of the merchandise (provided it be written, printed, branded, or stamped in a mode peculiar to itself); in a seal, a letter, a cipher, a monogram, or any other sign or symbol that can serve to distinguish the products of one man from those of another. It may be any symbol or emblem, however unmeaning itself, as a cross, a bird, a quadruped, a castle, a star, a comet, a sun; or it may, and frequently does, consist of a combination of various objects, copied from nature, art, or fancy; and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a particular person, no other trader has a right to affix it to goods of a similar description. It may be adhesive or non-adhesive. It may be put inside of the article, or on the outside. It may be written, printed, stamped, painted, stencilled, branded, or otherwise, and either on the article itself, or on its case, covering, envelope, or wrapper."

2. Tho trademarks have probably been in use for many centuries the Anglo-American law on the subject is largely the product of the last hundred years; Browne, Trade Marks § 1. In Blanchard v. Hill (1742) 2 Atk. 484, Lord Hardwicke said he did not know of any instance of granting an injunction to restrain one trader from using the same mark with another.

3. See 12 Harv. Law Rev. 243, 244.

4. Regis v. Jaynes (1904) 185 Mass. 458, 460; 4 Harv. Law Rev. 321, 322.

5. Canal Co. v. Clark (1871) 13 Wall. 311 (no exclusive right to name "Lackawanna Coal").

6. Merriam v. Texas Siftings Pub. Co. (1892) 49 Fed. 944 (no exclusive right to name "Webster's Dictionary").

7. Fischer v. Blank (1893) 138 N. Y. 244, 33 N. E. 1040 (no exclusive right to use of words "Black Package Tea"). See 6 Col. Law Rev. 350; 16 Harv. Law Rev. 272-290.

8. Falk v. Am. West Indies Trade Co. (1905) 180 N. Y. 445, 73 N. E. 239.

9. 5 Col. Law Rev. 401.

The common law remedy for the infringement of such a right is an action on the case for damages, brought by the manufacturer or vendor;[10] but the more usual remedy is by a bill in equity[11] for an injunction against the continuance of the infringement and an accounting of the profits made.[12]

§ 231. Cases analogous to trade marks—unfair competition.

Where the means used by the plaintiff to identify his goods is not of the kind in which the law recognizes that an exclusive right may be acquired by prior user, relief may still be obtained against a defendant who undertakes to palm off his goods upon the public as those of the plaintiff.[1] In the United States relief in

10. An action in the nature of deceit; Leather Cloth Co. v. American Leather Cloth Co. (1863) 4 DeG., J. & S. 137. It is not strictly an action for deceit because, although the manufacturer or vendor is damaged by the fraud, it is the buying public to whom the fraudulent representations are addressed. Where a member of the public suffers damages by being induced to buy inferior goods he is entitled to an action on the case for deceit where the infringement was knowingly made but is obviously not entitled to an injunction against future deception. Conceivably a public official might be given an injunction in order to protect the public generally but there seems to be no trace of this; the natural vigilance of the trade mark owner is probably a sufficient safeguard of the public interest.

11. Leather Cloth Co. v. American Leather Cloth Co. (1863) 4 DeG., J. & S. 137.

12. Saxlehner v. Eisner & Mendelson Co. (1905) 138 Fed. 22; see 20 Harv. Law Rev. 620, 621.

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1. Croft v. Day (1843) 7 Beav. 84: "No man has a right to dress himself in colors or adopt and bear symbols to which he has no peculiar or exclusive right, and thereby personate another person, for the purpose of inducing the public to suppose, either that he is that other person, or that he is connected with or selling the manufacture of such other person while he is really selling his own. It is perfectly manifest that to do these things is to commit a very gross fraud." It should be pointed out, however, that the exclusive trademark right evolved out of protection given against fraud; 7 Col. Law Rev. 120; and that the boundary line between trade mark cases and cases analogous to trademarks is by no means a clear cut and perma-

such cases seems to be given only against a defendant who has acted with fraudulent intent,[2] whereas in England it is sufficient, in order to get injunctive relief,[3] to show that the defendant's conduct does have the result or is likely to have the result of deceiving customers into buying his wares for and as the plaintiff's wares.[4]

A limited protection is thus afforded to a plaintiff in the use of descriptive words,[5] geographical names[6] and trade names,[7] including the use of one's own name.[8]

nently fixed line of demarcation; see 16 Harv. Law Rev. 272, 274; see also 4 Harv. Law Rev. 321-332, Cases Analogous to Trade Marks, by G. D. Cushing; 10 Harv. Law Rev. 275-298, Unfair Competition, by Oliver R. Mitchell; 5 Harv. Law Rev. 139-145, Prevention of Unfair Competition in Business, by Rowland Cox.

2. Daviess County Distilling Co. v. Martinoni (1902) 117 Fed. 186, 188; 16 Harv. Law Rev. 272, 283.

3. An innocent defendant would probably not be liable even in England for such conduct prior to notice of the plaintiff's rights; 16 Harv. Law Rev. 272, 290.

4. Millington v. Fox (1838) 3 Myl. & Cr. 338, 352, 16 Harv. Law Rev. 278.

5. In Waterman v. Shipman (1891) 130 N. Y. 301, 29 N. E. 111, the plaintiff was protected against unfair competition in the use of the word "Ideal" as applied to fountain pens. In Cooke & Cobb Co. v. Miller (1902) 169 N. Y. 475, 62 N. E. 582, the plaintiff tried to establish a trade mark in the word "Favorite" as applied to letter files and of course failed. Conceivably he might have succeeded in getting relief if he had proceeded on the ground of unfair competition. 2 Col. Law Rev. 406. See also 12 Harv. Law Rev. 349.

6. Busch v. Gross (1906) 71 N. J. Eq. 508, 64 Atl. 754 ("Metuchen Inn"); W. R. Lynn Shoe Co. v. Auburn-Lynn Shoe Co. (1905) 100 Me. 461, 62 Atl. 499 ("Auburn-Lynn Shoes"). See also 11 Col. Law Rev. 798.

7. Cohen v. Nagle (1906) 190 Mass. 4, 76 N. E. 276 ("Keystone Cigars"); see 6 Col. Law Rev. 349, 363. The word "Keystone" was in common use as a public label and hence no exclusive copyright could be conceded. See also 7 Col. Law Rev. 120, 142 discussing U. S. Frame & Picture Co. v. Horowitz (1906) 100 N. Y. Supp. 705.

8. Nolan Bros. Shoe Co. v. Nolan (1900) 131 Cal. 271, 63 Pac. 480; 14 Harv. Law Rev. 622; Wyckoff, Seamans & Benedict v. Howe Scale Co. (1903) 122 Fed. 348, 3 Col. Law Rev. 494, ("Remington Typewriter"); Fine Cotton Spinners etc. v. Harwood Cash & Co. (1907) 2 Ch. D. 184; 7 Col. Law Rev. 629. In Edison v. Edison Polyform Mfg.

Since relief is granted on the theory of protecting the public and the plaintiff against fraudulent simulation by the defendant, the plaintiff is not entitled to protection where the public is not likely to be deceived;[9] or where he has himself been guilty of deception of the public.[10]

§ 232. Protection of non-commercial names.

There is much conflict of opinion as to whether the protection accorded to trade names should be extended to non-commercial names. Perhaps the stronger tendency has been to refuse relief,[1] tho an injunction has been granted in a few cases.[2] It may well be urged that even tho pecuniary damage is not involved, it is desirable to give protection where the public is likely to be deceived

Co. (1907) 73 N. J. Eq. 136, 67 Atl. 392, protection was given to a plaintiff who was not competing with the defendant. See also 12 Harv. Law Rev. 243-261, Deceptive Use of One's Own Name, by W. L. Putnam. Since a corporation in choosing a name has a very large field from which to select, it has been contended that the protection afforded to corporate trade names should be based upon a property right and not merely upon protection from fraud; 6 Col. Law Rev. 249-258.

9. Russia Cement Co. v. Frauenhar (1904) 32 N. Y. L. J. 475 ("LePage's Fish Glue"); see 5 Col. Law Rev. 63. A plaintiff whose goods are not known outside a limited territory is not entitled to an injunction covering the whole United States; Briggs v. National Wafer Co. (1913) 215 Mass. 100, 102 N. E. 87 ("Boston Wafers"); see 27 Harv. Law Rev. 190..

10. Manhattan Co. v. Wood (1883) 108 U. S. 218, 8 Col. Law Rev. 40, 236. See also 4 Col. Law Rev. 365 and 19 Harv. Law Rev. 128. Where the plaintiff's misconduct does not relate in any way to the sale of the goods, it is no bar to an injunction; World's Dispensary etc., Ass'n v. Pierce (1911) 203 N. Y. 419, 96 N. E. 738 (violation of statute forbidding stock corporations to practice medicine or conduct hospitals); see 25 Harv. Law Rev. 481.

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1. Most Worshipful Grand Lodge Free, Ancient and Accepted Masons etc. v. Grimshaw (1909) 38 Wash. Law Rep. 130. For criticism see 23 Harv. Law Rev. 572.

2. Colonial Dames of America v. Colonial Dames of New York etc. (1899) 29 N. Y. Misc. 10 (1901) 71 N. Y. Supp. 1134, criticised in 2 Col. Law Rev. 245 and in 13 Harv. Law Rev. 685.

and the work of worthy charitable organizations thereby hindered, especially when the defendant is profiting by the infringement.[3]

§ 233. Other fraudulent representations to third parties.

Where the defendant's fraud consists of misrepresentations to the plaintiff himself, it is obvious that the plaintiff does not need preventive relief; his right to specific reparation will be treated in a later chapter.[1]

In § 231, *ante,* relief was based upon the fundamental ground of prevention of fraudulent representations to third parties which is harmful to the plaintiff. There are a few cases, however, which cannot be classified under that section. In Drummond v. Altemus[2] the plaintiff was given an injunction against the publication of an inacurate report of his public lectures. And in Routh v. Webster[3] the defendant corporation was enjoined from publishing the name of the plaintiff in its prospectus as one of its trustees, because it would tend to expose him to litigation.[4]

3. Legal Aid Soc'y v. Wage Earner's Legal Aid Ass'n (1908) 39 N. Y. Law J. 332, 8 Col. Law Rev. 514. Where no deception of the public is likely the only basis for protecting a non-commercial name would be the recognition of a right of privacy; see Vassar College v. Loose Wiles Biscuit Co. (1912) 197 Fed. 982 (defendant used name, seal and insignia of college for advertising purposes). See also 12 Col. Law Rev. 745.

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1. See *post* Chapter 6, Rescission.

2. (1894) 60 Fed. 338.

3. (1847) 10 Beav. 561.

4. See also Vanderbilt v. Mitchell (1907) 72 N. J. Eq. 910, 67 Atl. 97; the plaintiff was awarded cancellation of a birth certificate which his wife had obtained for her infant child from the attending physician by fraudulently representing to the latter that the plaintiff was the father of the child. For a discussion of the cases where the false statement complained of is libellous, see *post* § 239.

J. INTERFERENCE WITH CONTRACT AND BUSINESS RELATIONS.

§ 234. Compelling or inducing breach of contract.

If a defendant by intimidation[1] or fraud[2] or bribery[3] prevents a third party X from performing his contract with the plaintiff; he is liable at common law in an action on the case; and if damages are inadequate,[4] the plaintiff may get injunctive relief in equity.[5]

Where peaceable persuasion only is used to induce non-performance, it would seem to be the better view[6] that procuring a breach of contract by such means should be held to be a *prima facie* tort[7] which might be justified either by the defendant's family relationship

1. Doremus v. Hennesy (1898) 176 Ill. 608, 52 N. E. 924, 54 N. E. 524; see also 11 Harv. Law Rev. 469.

2. Van Horn v. Van Horn (1890) 52 N. J. L. 284, 20 Atl. 485. See also 22 Harv. Law Rev. 50, 61, discussing Sperry & Hutchinson Co. v. Louis Weber Co. (1908) 161 Fed. 219.

3. Angle v. Chicago R. Co., (1894) 151 U. S. 1. In Davis v. Condit (1913) 124 Minn. 365, 144 N. W. 1089 the complainant alleged that the defendant by seducing X interfered with the marriage contract then subsisting between X and the plaintiff. The complaint was held bad on demurrer; see 27 Harv. Law Rev. 589. See also 24 Harv. Law Rev. 397, 412, as to whether a negligent act of the defendant which interferes with the performance of X's contract with the plaintiff is a tort.

4. Where the plaintiff is engaged in business, damages are usually inadequate because conjectural; damages are also inadequate, it has been suggested, where the defendant's credit is not as good as that of X; see 11 Harv. Law Rev. 469, 470.

5. Jersey City Printing Co. v. Cassiday (1902) 63 N. J. Eq. 759, 53 Atl. 230.

6. Lumley v. Gye (1853) 2 Ellis & B. 216 (defendant induced Miss Wagner not to sing for the plaintiff but for himself. The case was a strong one for the plaintiff because he had been able to get an injunction against Miss Wagner's singing for Gye. See *ante* § 72. And see 2 Harv. Law Rev. 19-27.

7. See 16 Harv. Law Rev. 299; 8 *id.* 1, 12.

to X[8] or perhaps by other circumstances.[9] There is, however, square conflict of authority on the point.[10] If such conduct is held to be a tort and damages are inadequate, equitable relief will of course be given.[11]

§ 235. Interference with "probable expectancies" of an employer—strikes and boycotts.

An employer of labor—whether he makes contracts of employment with his employees or not—has obviously an interest in the freedom of the labor market; this interest has received legal recognition and some legal protection. If a defendant—usually a former employee or an official of a labor union—interferes by intimidation with this probable expectancy of a plaintiff employer, the latter is entitled to recover damages in an action on the case at law,[1] or if damages are inad-

8. For example, if a brother should persuade his sister to break her engagement with an unworthy fiance; see 16 Harv. Law Rev. 299.

9. That the defendant was seeking his own economic advancement is not a justification; Beattie v. Callahan (1903) 81 N. Y. Supp. 413, 3 Col. Rev. 426; see also 12 Harv. Law Rev. 285. In England, by statute 6 Ed. 7, c. 47, interference with contracts of employment, in furtherance of a trade dispute, is not thereby made illegal; 20 Harv. Law Rev. 656.

10. There is a tendency to restrict recovery to cases of contracts of personal service; Nat'l. Phonograph Co. v. Edison—Bell Phonograph Co. (1906) 23 T. L. R. 189, 20 Harv. Law Rev. 656; see also 16 Harv. Law Rev. 228, 299. It is difficult to see any sound analytical basis for such a distinction.

11. American Law Book Co. v. Edward Thompson Co. (1903) 84 N. Y. Supp. 225; 17 Harv. Law Rev. 283.

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1. The intimidation usually takes the form of forcible picketing, which seems to be always held unlawful; Murdock, Kerr & Co. v. Walker (1893) 152 Pa. St. 595, 25 Atl. 492; 15 Harv. Law Rev. 482. The imposition of a fine upon members of a union if they continued to work has been held to be unlawful as intimidation. Martell v. White (1904) 185 Mass. 255, 69 N. E. 1085; 22 Harv. Law Rev. 234.

equate,[2] to injunctive relief in equity.[3]

Where no intimidation is involved there is much conflict of authority as to the legality of such weapons as the strike,[4] the boycott[5] and picketing.[6] This unsettled state of the authorities is likely to continue until public opinion becomes much more nearly crystallized than it is at present.[7] Where the conduct of the defendants in a particular case is held to be unlawful, the

2. Damages are usually inadequate because conjectural and because the defendants are usually financially irresponsible. Avoiding a multiplicity of actions has also been suggested as a reason for equity interference; Barr v. Essex Trades Council (1894) 53 N. J. Eq. 101, 126, 30 Atl. 881.

3. U. S. ex rel. Guaranty Trust Co. v. Haggerty (1902) 116 Fed. 510; 2 Col. Law Rev. 552. See also 10 Harv. Law Rev. 56; 16 *id.* 600.

4. The modern tendency is to regard as lawful a peaceful strike for the purpose of bettering the condition of the strikers; Kemp v. Division No. 241 (1912) 255 Ill. 213, 99 N. E. 389; Minasian v. Osborne (1911) 210 Mass. 250, 96 N. E. 1036. In DeMinico v. Craig (1911) 207 Mass. 593, 94 N. E. 317, a strike for the purpose of getting rid of a foreman whom the employees did not like was held to be unlawful. In Wabash R. R. Co. v. Hannahan (1903) 121 Fed. 563, an injunction was given against a peaceful strike because the strikers were employed by a public service company. For criticism see 16 Harv. Law Rev. 518.

5. In Parkinson Co. v. Building Trades Council (1908) 154 Cal. 581, 98 Pac. 1027, the defendant's boycott was held to be lawful. See also Haile v. Livingstone (1891) 35 Sol. Jour. 792. On the other hand, the defendant's conduct was held to be unlawful in Schlang v. Ladies' Waist Markers' Union (1910) 124 N. Y. Supp. 289; 10 Col. Law Rev. 652, 674. See also New England Cement Gun Co. v. McGivern (1914) 218 Mass. 198, 105 N. E. 885 (secondary boycott held unlawful); and 14 Col. Law Rev. 694.

6. Peaceful picketing is usually regarded as lawful, but as pointed out in 15 Harv. Law Rev. 482, most picketings are not peaceful because the very presence of a picket usually contains a threat of violence. In Sherry v. Parkins (1888) 147 Mass. 212, 17 N. E. 307, the carrying of a banner in front of the plaintiff's shoe factory was enjoined as a private nuisance. In England there is legislation making picketing criminal and in Lyons v. Wilkins (1896) 1 Ch. 811, the injunction given was based on the statute. For a criticism of such reasoning see 12 Harv. Law Rev. 502.

7. See 11 Harv. Law Rev. 449-465; 20 *id.* 253-279, 354-362,

plaintiff nearly always seeks equitable relief because damages would be conjectural in amount and the defendants are usually irresponsible financially.[8]

§ 236. Interference with "probable expectancies" of an employee—the blacklist.

Corresponding to the interest of the employer in the freedom of buying on the labor market is the interest of the employee in the freedom of selling on the labor market. Any forcible interference with the probable expectancy of the employee in disposing of his labor would no doubt be tortious.[1] Altho superficially a combination of employers to blacklist an employee seems analogous to a strike by employees,[2] the relatively greater powers wielded by a combination of employers makes it more nearly analogous to the boycott[3] and is therefore usually illegal.[4] Where there is no combination of employers but the defendant has merely shown his list to another employer, relief is usually denied.[5]

Injunctive relief has been rarely sought and apparently never granted.[6] It has been argued that since boycotts are enjoined, it is only fair and equal that the employee should be given equitable relief against the corresponding weapon of the employer.[7] On the other

429-455; 17 *id.* 558; 18 Harv. Law Rev. 444-451, 423-443; 5 Col. Law Rev. 107-123.

8. In a few states statutes have been passed prohibiting the use of injunctions in labor disputes; 30 Harv. Law Rev. 75, 85.

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1. There seems to be no case exactly in point; see 15 Col. Law Rev. 715.

2. See 17 Harv. Law Rev. 139.

3. Mattison v. Lake Shore etc. R. R. Co. (1895) 3 Ohio S. & C. P. 526.

4. In some states statutes have been passed making such blacklisting a penal offense; Martin, Modern Law of Labor Unions § 277.

5. Boyer v. Western Union Tel. Co. (1903) 124 Fed. 246; 17 Harv. Law Rev. 139.

6. Worthington v. Waring (1892) 157 Mass. 421, 32 N. E. 744.

7. Atkins v. Fletcher Co. (1904) 65 N. J. Eq. 658, 666, 55 Atl. 1074; 15 Col. Law Rev. 715.

hand, damages are usually adequate, because all that the laborer ordinarily wants is money.[8]

§ 237. Interference with probable expectancies of a competitor; of a non-competitor.

The infliction of damage upon a trade[1] rival in fair competition is excused[2] because of the social interest in the lowering of prices to the consumer. Competition is not considered fair, however, where the defendant employs force[3] or fraud[4] or defamation[5] or disparagement of goods[6] as a weapon. A more difficult question is presented where several combine to drive a plaintiff out of business by underselling him,[7] or where a single

8. In Worthington v. Waring (1892) 157 Mass. 421, the court argues that there was "no approved precedents in equity . . . for compelling the defendants either to employ the petitioners or to procure employment for them with other persons." This, however, is not a conclusive reason why purely negative relief might not be granted against the combination to blacklist. See *ante* § 78.

1. Occasionally employees are referred to as competitors of their employers, and in a broad, loose sense this is true. More often, however, the term competition is used in the more limited sense.

2. According to modern analysis competition is not regarded as an absolute right but as a matter of justification or excuse under all the circumstances. 15 Harv. Law Rev. 444.

3. Keeble v. Hickeringill (1809) 11 East 574 note; Tarleton v. McGawley (1794) 1 Peake 205 (firing upon African natives who were about to trade with the plaintiff). And see 7 Col. Law Rev. 428.

4. Croft v. Day (1843) 7 Beav. 84 (infringement of trademark; see *ante* § 230). Dunshee v. Standard Oil Co. (1911) 152 Ia. 618, 132 N. W. 371; 25 Harv. Law Rev. 296. And see 23 Harv. Law Rev. 402,

5. Harman v. Delany (1731) 2 Strange 898.

6. Paull v. Halferty (1869) 63 Pa. 46.

7. In Mogul Steamship Co. v. McGregor (1892) A. C. 25 the defendants, owners of trading vessels, combined to offer very low shipping rates in order to drive the plaintiff out of business and offered 6% rebate to those who would ship exclusively by their ships. This was held not actionable. But in Hawarden v. Youghiogheny Co. (1901) 111 Wis. 545, 87 N. W. 472 a declaration

defendant, with a dominating desire to damage or ruin the plaintiff,[8] accomplishes or threatens to accomplish the same result. Where the competition is held to be unfair the plaintiff is entitled to damages in an action on the case; and, since damages are usually inadequate,[9] to an injunction in equity.[10] The same question of what is fair competition has recently been raised between rival trade unions.[11] Where the competition is held to be unfair the plaintiff is, of course, entitled to damages.[12] Whether injunctions are likely to be given in such cases is not so clear; it may well be contended that damages are adequate because what the plaintiff wants is money for his labor and it is fairly easy to estimate his loss.

Where a defendant has intentionally[13] caused loss to

alleging that the defendants—wholesale and retail dealers—agreed to trade exclusively with one another for the purpose, among others, of forcing the plaintiffs out of business, and that the purpose was accomplished, was held good on demurrer. See 15 Harv. Law Rev. 402.

8. In Boggs v. Duncan-Schell Furniture Co. (1913) 163 Ia. 106, 143 N. W. 482, the defendant advertised sewing machines at half price in order to drive the plaintiff out of business, but there was an element of fraud also in the case. See 18 Harv. Law Rev. 420, 27 *id.* 374.

9. Since damage to a business is involved, it is usually, if not always, very difficult to estimate the amount of the loss.

10. On the general subject of competition see 15 Harv. Law Rev. 427-445, Competition and the Law, by Bruce Wyman; 16 Harv. Law Rev. 237-254, Rights of Traders and Laborers, by E. F. McClennen; 17 Harv. Law Rev. 511-532, The Combination Law and Opinion, by A. K. Dicey; 22 Harv. Law Rev. 501-519, Motive as an Element in the Law of Torts, by F. P. Walton; 18 Harv. Law Rev. 418-422, Tort because of Wrongful Motive, by Professor Ames.

11. In National Protective Ass'n v. Cumming (1902) 170 N. Y. 315, 63 N. E. 369, the plaintiffs and defendants, members of rival trade unions, had been employed by a common master; desiring to procure the discharge of the plaintiffs and the employment of their own fellow members in their stead, the defendants succeeded in achieving this end by threat of a strike; the court held that the plaintiffs had no right of action. See 2 Col. Law Rev. 400.

12. See London Guarantee etc. Co. v. Horn (1902) 101 Ill. App. 355; 16 Harv. Law Rev. 71.

13. Where the harm is caused negligently it would seem that the same reasoning should apply, but apparently there are no cases

one who is not his competitor, it should be held a tort[14] unless he is able to show some other excuse. If no such excuse is forthcoming the plaintiff should be entitled to legal relief and to equitable relief if the former is adequate.

K. Defamation—Interference with Privacy.

§ 238. Disparagement of property.

One who without excuse[1] misrepresents to third

which have allowed recovery. In Central Ga. Power Co. v. Stubbs (1913) 141 Ga. 172, 80 S. E. 636 the defendant's dam by backing water in the vicinity of the plaintiff's grist mill caused malaria which drove away the plaintiff's trade. It was held that the plantiffi could not recover for this loss of business. For criticism, see 27 Harv. Law Rev. 689.

14. In Tuttle v. Buck (1911) 107 Minn. 145, 119 N. W. 946 the defendant, a banker and a man of wealth and influence in his community established a barber shop and used his personal influence to attract customers to his shop, for the sole purpose of injuring the plaintiff, whereby the plaintiff's trade was ruined. It was held that the plaintiff had a good cause of action. It is to be observed that the defendant was not in substance a competitor of the plaintiff because he was not seeking his own economic advancement but merely the ruin of the plaintiff. See 22 Harv. Law Rev. 616. It has been argued that a retailer who advertises and sells a standard article at less than the price fixed and advertised by the manufacturer should be liable in tort to the latter where such price cutting results in serious damage to him. See 27 Harv. Law Rev. 139, 151. In Holbrook v. Morrison (1912) 214 Mass. 209, 100 N. E. 1111 the defendant, intending to sell her land, but actuated by ill will toward the plaintiffs, erected a large sign on the land bearing the words "For Sale. Best Offer from Colored Family." The threatened sale was seriously interfering with the plaintiff's real estate business. An injunction was refused, however, because a real sale was intended and the right to sell property is too important an incident of ownership to be interfered with except for very weighty reasons. See 26 Harv. Law Rev. 740.

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1. As to how far one may be excused who has made the false statement in good faith to protect or advance his own economic interests, see 13 Col. Law Rev. 13-36, 127-142 The Disparagement of Property, by Professor Jeremiah Smith. See also 13 Mich. Law Rev. 614.

persons the quality of another's property[2] or disparages the latter's title[3] thereto, is liable at common law in an action on the case[4] for damages. Where the remedy at law is inadequate,[5] there is no plausible reason why equity should not give injunctive relief since only rights of property and not of personality are involved.[6] The strong tendency in this country however, has been to refuse relief, due largely to confusing the subject with that of disparagement of character.[7]

2. This is sometimes called trade libel; George v. Blow (1899) 20 N. S. W. L. R. 395; but it is not necessary that the disparagement be in writing. Sometimes it is called disparagement of goods, but the protection is extended to land as well as chattels; Nogy v. Manitoba Free Press Co. (1907) 16 Manitoba 616.

3. This is usually called slander of title; but it is immaterial whether the statement be in writing or oral; Malachy v. Soper (1836) 2 Bingham's N. C. 371.

4. Whether the statement be oral or in writing it is necessary that the plaintiff allege and prove that special damage resulted from the disparagement; Malachy v. Soper *supra*.

5. For example, if the plaintiff's business consists in selling the disparaged property, or if the defendant is primarily irresponsible, as in Shoemaker v. South Bend etc. Co. (1893) 135 Ind. 471, 35 N. E. 280.

6. For an argument against denying relief see 15 Harv. Law Rev. 735, approving Marlin etc. Co. v. Shields (1901) 68 N. Y. App. Div. 88; this decision was later reversed in 171 N. Y. 384, 64 N. E. 163. In that case the defendant, a magazine editor, in order to compel the plaintiff to adertise his rifles in the defendant's magazine, wrote and published fictitious letters derogatory of the plaintiff's goods. See also 2 Col. Law Rev. 175.

7. In Boston Diatite Co. v. Florence Mfg. Co. (1873) 114 Mass. 69 the plaintiff's bill alleged that the defendant threatened certain persons for infringement of their patent, thus injuring the plaintiffs' business, and asked that the defendant be enjoined from making such representations. The bill was held bad on demurrer. But see Emack v. Kane (1888) 34 Fed. 46, a very similar case in which relief was given on the ground of the defendant's insolvency. The earlier English doctrine is shown in Prudential Assurance Co. v. Knott (1875) 10 Ch. App. 142 where the court refused to enjoin the publication of a pamphlet which charged the plaintiff insurance company with reckless extravagance.

§ 239. Disparagement of character—libel and slander.

If disparagement of character[1] is in writing or other permanent form,[2] the proper remedy is an action on the case for libel.[3] If it is made orally or in temporary, fugitive form[4] the proper remedy is an action on the case for slander.[5] Logically, equity should give injunctive relief in all cases where the relief at law is not adequate, as it does in the case of waste, trespass and other torts; and that is now the present English rule where in consequence of the defamation the plaintiff has suffered material damage, such as damage to his business.[6] In the United States, however, this result has not yet been reached but there is a tendency in this

1. A defamatory statement is one that holds a person up to hatred, contempt or ridicule, or tends to injure him in his office, business, trade or profession. It must be communicated to some person other than the plaintiff and where special damage is necessary, it must be damage to the reputation, not to character or other subjective condition of the plaintiff.

2. It may be printed, or be by the painting, caricature, effigy or emblem.

3. It is not necessary to allege or prove special damage in case of libel, while in case of slander this is necessary unless the charge imputes a crime, a loathsome disease, or disparages a person in his trade, office, business or profession.

4. Hissing an actor, if defamatory, would be slander, not libel; so imitating another's walk or conveying ideas by gestures, if defamatory, would be slander.

5. For a discussion of the historical reasons for the illogical distinction between the law of libel and slander see 3 Col. Law Rev. 546-573, History and Theory of the Law of Defamation, by Van Vechten Veeder.

6. The earlier English doctrine is shown in Prudential Assurance Co. v. Knott (1875) 10 Ch. App. 142 where the court refused to enjoin the publication of a pamphlet charging that the plaintiff company was managed recklessly and was insolvent. The present English rule is shown in Hayward v. Hayward (1886) 34 Ch. D. 198 where the court enjoined the defendant from representing his firm to be the original firm of R. H. and Sons. The change in the English rule has been attributed to the Common Law Procedure Act of 1854 and the Judicature Act of 1873, but as pointed out by Professor Pound, these statutes were not supposed to change the substantive rules of equity; 29 Harv. Law Rev. 640, 665.

direction.[7] Where the sole damage suffered consists of an injury to personality, —i. e. the feelings of the plaintiff—there is very little authority for giving injunctive relief,[8] tho the reasons for not giving it are hardly plausible. The arguments urged against giving relief in defamation cases are the following: (1) That equity protect only property rights.[9] (2) That the right of free speech would be violated by giving an injunction.[10] (3) That libel is a crime and equity should not enjoin the commission of a crime.[11] The answer to the first argument is that even tho in the past equity has found it expedient to limit its protection to property rights, it was merely a matter of expediency and there is no substantial reason to-day for any such limitation.[12] The answer to the second argument is that the common

7. See 29 Harv. Law Rev. 640, 667.

8. There are some early English cases which seem to indicate that equity would at that time give relief against such defamation. In Du Bost v. Beresford (1810) 2 Campbell 511, Lord Ellenborough held that the owner of a libellous painting which had been destroyed by a brother of the woman libelled, could recover in trespass only for the value of the canvass and paint, because the "Lord Chancellor would have granted an injunction against its exhibition." The cases of Gee v. Pritchard (1818) 2 Swanst. 402 and Brandreth v. Lance (1839) 8 Paige 24 settled the rule against giving relief. Recently, however, in England there have been some cases showing a tendency to relax the rule again. See Monson v. Tussauds (1894) 1 Q. B. 671; 10 Harv. Law Rev. 517; 7 *id.* 492.

9. Gee v. Pritchard, *supra.*

10. Brandreth v. Lance, *supra;* New York etc. Soc'y v. Roosevelt (1877) 7 Daly 188.

11. Gee v. Pritchard, *supra.*

12. See dictum in Vanderbilt v. Mitchell (1907) 72 N. J. Eq. 910, 919, 67 Atl. 97; " . . . an individual has rights other than property rights, which he can enforce in a court of equity etc." See also Dixon v. Holden (1869) 7 Eq. 488 where the court said: "What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation." In the less complex society of a half century or a century ago, there was much less need of equitable protection of rights of personality than there is to-day; see 10 Harv. Law Rev. 517, 21 *id.* 54.

law right of free speech and "liberty of the press" which is now guaranteed by American constitutions, goes back historically to the privilege of being free from injunctions in the publication of political libels and is not violated by injunctions in cases of non-political libels.[13] The answer to the third argument will be given in another place.[14]

§ 240. Interference with privacy.

Where the interests of personality have been interfered with in other ways than by defamation, the most important question involved is likely to be whether there is any legal right involved. In recent years there has been much conflict of authority[1] and opinion[2] as to whether there is a common law right of privacy,

13. See 13 Col. Law Rev. 732 approving the giving of an injunction in Schwartz v. Edrington (1913) 133 La. 235, 62 So. 660, where the defendant published what purported to be a signed petition after the signers had repudiated it as having been signed under a misapprehension. See also 29 Harv. Law Rev. 640, 650-655, 10 *id.* 176. Where the defamation does not involve publication,—as in the case of shadowing the plaintiff by detectives so as to cause loss of credit—denial of relief is of course put upon a different ground. In Chappell v. Stewart (1896) 82 Md. 323, it was put upon the ground that the act complained of was a crime.

14. See *post* Chap. IV, Prevention of Crime and Criminal Proceedings.

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1. In Roberson v. Rochester Folding Box Co. (1902) 171 N. Y. 538, 64 N. E. 442, the plaintiff, a young lady, asked an injunction against using her photograph in advertising a brand of flour. Relief was refused on the ground that there was no right of privacy. But see *contra*, Pavesich v. New England Life Ins. Co. (1905) 122 Ga. 190, 50 S. E. 68, in which recovery was allowed to a plaintiff whose photograph had been used to advertise life insurance; 13 Harv. Law Rev. 415, 18 *id.* 625.

2. In favor of the existence of such a right see 4 Harv. Law Rev. 193-220, The Right to Privacy, by Samuel D. Warren and Louis D. Brandeis. See also 5 Harv. Law Rev. 149; 9 *id.* 354; 12 *id.* 207; 22 *id.* 110, 111; 21 *id.* 54; 2 Col. Law Rev. 486; 12 *id.* 693-708.

the present tendency[3] being toward the recognition[4] of such a right.[5] Where such a right is recognized[6] either with or without a statute, equity nearly always[7] gives injunctive relief[8] because of the obvious inadequacy of damages.[9]

L. Interference with Domestic, Social and Political Relations.

§ 241. Interference with domestic relations.

When the act of the defendant has consisted of interfering with domestic relations, equitable relief has rarely been given unless a property right was involved. In Hodecker v. Stricker[1] where the defendant pretended

3. See 24 Harv. Law Rev. 680, discussing Munden v. Harris (1910) 153 Mo. App. 652, 134 S. W. 1076 in which injunctive relief was given.

4. In some states this recognition has come by statute. See New York Laws of 1903, ch. 132; Binns v. Vitagraph Co. (1913) 210 N. Y. 51, 103 N. E. 1108; 22 Harv. Law Rev. 232. In 13 Harv. Law Rev. 415 it is suggested that this is the better solution; but see 8 Mich. Law Rev. 221.

5. A public character, such as a well known inventor, has no such right of privacy as would forbid the publication of a biography; see 7 Harv. Law Rev. 182.

6. Courts recognizing the right are disagreed as to whether it should be regarded as a right of personality or of property. See 24 Harv. Law Rev. 680; 7 Col. Law Rev. 533-536.

7. In Chappell v. Stewart (1896) 82 Ind. 323 where the court refused to enjoin the defendant from employing detectives to shadow the plaintiff, the court suggests that the plaintiff may have an action at law. But whether the court had in mind an action of trespass for false imprisonment or an action on the case for slander, or an action for interfering with privacy, is not clear. In the somewhat similar case of Schultz v. Frankfort etc. Co. (1913) 151 Wis. 537, 139 N. W. 386 recovery was allowed on the ground of slander. See 26 Harv. Law Rev. 658; 13 Col. Law Rev. 336. For a criticism of Chappell v. Stewart see 37 L. R. A. 783.

8. See 24 Harv. Law Rev. 680.

9. See 29 Harv. Law Rev. 669.

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1. (1896) 39 N. Y. Supp. 515.

to be the wife of the plaintiff's husband, an injunction against such conduct was refused on the ground that there was no cause of action. The interest violated was not one of property but of personality.[2] In *Ex parte* Warfield[3] it was held that the lower court had jurisdiction to enjoin the defendant from conduct which would probably result in the complete alienation of the affections of the plaintiff's wife. It has been pointed out[4] that the authority of the case is weakened by the fact that there was a statute[5] in Texas which has been construed as giving a wider power of granting injunctions than that generally possessed by courts of equity; and also by the fact that the decision might perhaps be rested upon the husband's property right in the wife's services. In Vanderbilt v. Mitchell[6] the plaintiff's wife had a child by a third party with whom she had been living in adultery. She gave it her husband's name and by means of fraud induced the attending physician to certify that the plaintiff was the father. By statute this certificate was *prima facie* evidence of the facts set forth; and if after the plaintiff's death such evidence should remain uncontroverted, the child would inherit considerable real estate under the will of the plaintiff's mother. The court decreed cancellation of the certificate on the ground that it constituted a cloud on title but said *obiter* that relief would have been granted even if no property rights had been involved.[7]

2. See 29 Harv. Law Rev. 173: "The wrong sought to be enjoined was usurpation of the name to which she was entitled as the lawful wife of H. and the injury consisted in humiliation and injury to feelings and mental comfort caused by this open assumption of her name as well as her place by an adulteress."

3. (1899) 40 Tex. Crim. 413.

4. Professor Pound, in 29 Harv. Law Rev. 675.

5. Rev. Stat. § 2989.

6. (1907) 72 N. J. Eq. 910, 64 Atl. 87.

7. See 21 Harv. Law Rev. 44, 58, 7 Col. Law Rev. 533-536, 29 Harv. Law Rev. 675.

§ 242. Interference with social relations.

If a plaintiff complains that he has been or is about to be wrongfully expelled from a social club, equitable relief is usually confined to cases where the club owns property[1] of which the plaintiff is a co-beneficiary.[2] It has been suggested[3] that relief may be given on the ground of specific performance of the contract of membership. In Baird v. Wells,[4] however, the court said that such a contract resembled a contract for board and lodging and involved too close a personal relation for equity to undertake to enforce. As Professor Pound has suggested,[5] it is not necessary to order the defendants to associate with the plaintiff, but merely not to keep the plaintiff out wrongfully as long as they continue the club.

In most of the cases it is quite obvious that the plaintiff's chief interest is one of personality[6] and not of substance[7] and it is to be hoped that the courts will soon frankly recognize this as the proper basis for re-

1. Rigby v. Connol (1880) 14 Ch. D. 482. In Dawkins v. Antrobus (1881) 17 Ch. Div. 615 the club owned property but the expulsion was held to be rightful because it was according to rules which were consistent with natural justice.

2. Payment of lodge dues by the plaintiff does not constitute such a property right as would authorize equitable interference; Wellenvoss v. Grand Lodge etc. (1898) 103 Ky. 15, 45 S. W. 360 (decree that defendant be compelled to allow the plaintiff to participate in grand lodge meeting refused).

3. Krause v. Sander (1910) 66 N. Y. Misc. 601; the plaintiff was refused relief because the court found the expulsion to be regular and in accord with the contract of membership. See also Lawson v. Hewell (1897) 118 Cal. 613, 50 Pac. 763.

4. (1890) 44 Ch. Div. 661.

5. 29 Harv. Law Rev. 679.

6. Fisher v. Keane (1853) 11 Ch. D. 353; 29 Harv. Law Rev. 678 note.

7. Where the club in question is a trade union, the plaintiff's opportunity to earn a livelhood—an interest of substance—may be involved. In such a case equity might very easily protect it as a species of intangible property, if—as might often happen—the common law remedy were inadequate. In Rigby v. Connol (1880)

lief. In Baird v. Wells[3] the court solemnly said that they could not give relief against expulsion from the Pelican Club because no property right was involved; they nevertheless discussed the expulsion and pronounced it wrongful—which vindication was exactly what the plaintiff wanted to assuage his wounded feelings.

§ 243. Interference with political relations.

The decision of purely political questions[1] is not within the province of any court, whether law or equity but is for the executive and legislative branches of the government. This has probably led courts to make the much broader statement that equity has no jurisdiction over political matters generally.[2] Such statements have frequently been *obiter*, the decisions being sustainable on the ground that the proper remedy was by mandamus[3] or other common law, or equitable remedy[4] or that the relief sought would involve too much super-

14 Ch. D. 482 the denial of relief was placed on the ground that the club owned no property. The above point seems not to have been urged by the plaintiff.

3. (1890) 44 Ch. Div. 661. See 29 Harv. Law Rev. 679.

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1. For example, the amount of a tax to be levied, or the recognition of foreign governments. That equity will not enjoin the passage of a municipal ordinance which is legislative in character, see 23 Harv. Law Rev. 470 discussing C. R. I. & P. R. R. v. City of Lincoln (1910) 85 Neb. 765, 124 N. W. 142.

2. Fletcher v. Tuttle (1894) 151 Ill. 41: "nor do matters of a political character come within the jurisdiction of the court of chancery." See also *In re* Sawyer (1888) 124 U. S. 200; 13 Col. Law Rev. 526; 14 *id.* 243.

3. Fletcher v. Tuttle, *supra*: suit by a voter and by a candidate for election to the legislature to enjoin issuance of notices of election under an invalid apportionment act whereby a county was unlawfully excluded from the legislative district. See 13 Col. Law Rev. 528.

4. Webber v. Timlin (1887) 37 Minn. 274, 9 Col. Law Rev. 359.

vision.[5] Where these objections do not exist there seems to be no good reason[6] why equity should not interfere to protect political rights and relations, and there are several instances where relief has been given. In People *ex rel.* Miller v. Tool[7] it was held that the Supreme Court had original jurisdiction, upon application of the Attorney General, to enjoin the judges of election and other officials from committing or permitting others to commit frauds at the election. In Coleman v. Board of Education[8] the levy of a county educational tax was enjoined on the ground of fraud in the election by which the tax was made operative, the court holding that it could properly investigate an election collaterally if property rights were primarily involved.[9]

5. Winnett v. Adams (1904) 71 Neb. 817, 825, 99 N. W. 681. See also 12 Harv. Law Rev. 354 discussing Kearns v. Howley (1898) 188 Pa. 116, 41 Atl. 273 in which equity refused to restrain a chairman of a county committee of a political party from erasing from the roll of such committee the names of duly elected members. And see 17 Harv. Law Rev. 130.

6. 14 Col. Law Rev. 243, 244. As Professor Pound points out, in many of the cases the injury is to the feelings, sensibilities and dignity and equity has the same reluctance to give relief as in other cases of injury to personality. 29 Harv. Law Rev. 681. See *ante* § 239.

7. (1905) 35 Col. 225, 86 Pac. 224. See 20 Harv. Law Rev. 157.

8. (1908) 131 Ga. 643, 63 S. E. 41, 9 Col. Law Rev. 359.

9. In Patterson v. People *ex rel.* Parr (1913) 23 Col. App. 469, 130 Pac. 618 the officials at a local option election conspired to admit certain illegal votes and to exclude certain legal votes, thus changing the result of the election. In a suit by a tax payer for himself and others similarly situated to enjoin the issuance of licenses for the sale of liquor, it was decided that equity had jurisdiction to give such relief. For a criticism of the decision on the ground that the proper remedy was by mandamus to compel the election officials to reconvene and discharge their duties lawfully, see 13 Col. Law Rev. 526. In Giles v. Harris (1902) 189 U. S. 475, the plaintiff, on behalf of himself and 5000 other negroes asked for compulsory enrollment on the voting lists of Montgomery Co., Ala., and for a declaration that certain sections of the State constitution fixing qualifications for registry were void as in-

Tho political parties have now pretty generally received statutory recognition courts have been reluctant to subject them to control. In Walls v. Brundidge[10] the plaintiff charged that the Democratic Central Committee, constituted by statute for the trial of primary election contests, had fraudulently certified the name of his competitor to the Secretary of State as candidate for Governor and asked that the Secretary of State be restrained from certifying his rival's name to the various county election commissioners. Relief was refused on the ground that no property rights were involved.[11]

consistent with the Federal Constitution. Refusal of relief was placed upon three grounds: (1) That equity will not interfere to enforce a political right; (2) that precedent to granting the plaintiff's petition the court would be compelled to declare unconstitutional the very franchise provisions under which the plaintiff asks to be registered; (3) that equity could not undertake to police the state to enforce such a decree as was asked for. See 17 Harv. Law Rev. 130; 3 Col. Law Rev. 491.

10. (1913) 109 Ark. 250, 160 S. W. 230.

11. For criticism of the decision see 14 Col. Law Rev. 243; see also 12 Harv. Law Rev. 354. In a few instances relief has been given; see 14 Harv. Law Rev. 388.

CHAPTER IV.

Prevention of Crimes and Criminal Proceedings.

§ 244. Prevention of crimes.

In the early days of English equity, when the state was weak and unable thoroughly to enforce peace, the chancellors undertook to protect persons and property from violence.[1] As the state became stronger the need for relief from this source decreased so that by the end of the fifteenth century the jurisdiction of equity to prevent crimes had been practically abandoned.[2] The mere fact that an act was a crime, however, has not ordinarily prevented equity from giving an injunction if there are other well recognized grounds for exercising jurisdiction.[3] Within recent years this branch of equity has grown considerably, especially in cases involving labor disputes,[4] violations of public decency[5]

1. "The reign of Richard II found England in a turbulent and restless state. Politically it was a time of weak sovereigns; economically it was a period of transition and reformation. Manoral authority was breaking down and the power of municipalities and guilds was lessening. Highwaymen and rioters made trade and travel hazardous; powerful barons overawed the local courts. No sharp line was drawn between executive and judicial powers, and chancellors, probably without stopping to analyze in what capacity, exercised the royal prerogative delegated to them by Edward III to relieve the poor and the weak." The Revival of Criminal Equity, by Edwin S. Mack, 16 Harv. Law Rev. 389, 390.

2. 1 Spence, Eq. Juris. 688, 689.

3. Especially if serious injury to property is threatened. for which the legal remedy would be inadequeate; Spinning Co. v. Riley (1868) 6 Eq. 551.

4. See *ante* § 235. See also U. S. v. Debs (1895) 158 U. S. 564, in which case an injunction was granted and addressed to persons who had not been joined as defendants, restraining them

or combinations in restraint of trade.[6] In this, history seems to be repeating itself. One reason for the frequent calls for equitable interference in such cases has been the inefficiency of the administration of criminal law[7] in the United States; this in turn has been due in large measure to an elective judiciary and prosecuting officers and to the small power which courts exercises in the trial of criminal cases. And just as happened in the fifteenth century, there is a popular outcry against the giving of injunctions in such cases; this is true especially in labor controversies, because of the feeling that such interference favors the cause of the employer against the employee and because of the usual distrust and fear of one-man power. This has resulted in some states in legislation restricting the giving of

from flagrant breaches of the peace tho there was no property right to be protected. See 7 Col. Law Rev. 357-359 arguing in favor of such equitable interference upon petition by the State. In Lyons v. Wilkins (1896) 1 Ch. 811 the court based its giving of an injunction against picketing on the ground that the defendant's acts had been made criminal by statute. For criticism, see 12 Harv. Law Rev. 502.

5. Illegal saloons, 8 Ill. Law Rev. 19-41; 9 Harv. Law Rev. 521-533; gambling houses and brothels, State v. Patterson (1896) 14 Tex. Civ. App. 465, 37 S. W. 478, 10 Harv. Law Rev. 371; prize fights, Att'y Gen'l v. Fitzsimmons (1896) 35 American Law Register 100, 1 Ames Eq. Cas. 622.

6. Trust Co. of Ga. v. State (1900) 109 Ga. 736, 35 S. E. 723; 16 Harv. Law Rev. 398.

7. In Stead v. Fortner (1912) 255 Ill. 468, 99 N. E. 180 the bill alleged that on April 7, 1908, Shelbyville township voted to become anti-saloon territory, and two weeks later the city of Shelbyville also voted dry; on April 7, 1910, Shelbyville township voted wet but the city took no vote. On May 9, 1910 the city council passed a license ordinance and under it defendant Fortner sold liquor. The city authorities refused to interfere. The Attorney General and State's Attorney of Shelby County ask for an injunction. In holding that the demurrer to the bill was properly overruled the court said: " . . . if ordinary methods are ineffective or officials disregard their duties and refuse to perform them, the court ought to apply the strong and efficient hand of equity and uproot them." But see Powers v. Flansburg (1911) 90 Neb. 467, 133 N. W. 844.

injunctions in certain classes of cases where the acts sought to be enjoined are crimes.[8]

§ 245. Prevention of criminal proceedings.

The fundamental reason why equity should not attempt to prevent crimes as such and should be cautious in attempting to prevent crime even where other grounds of equity jurisdiction exist,[1] is the preeminent appropriateness of trial by jury in criminal cases. The same reason[2] applies generally to equity's prevention of ordinary common law proceedings to punish an act alleged to be criminal, and the general rule is that equity will not enjoin a criminal proceeding[3] even if property interests are incidentally affected.[4] Where, however, there would be irreparable injury to property or business caused by the prosecution and the sole question involved is one of law, there would seem to be no valid reason why equity should not give relief and the modern tendency is to give injunctions in such cases.[5]

8. For an argument in favor of such legislation see 16 Harv. Law. Rev. 402-404. In support of the jurisdiction see 7 Col. Law Rev. 357-359.

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1. See *ante* § 244.

2. In England there was perhaps another reason why equity was reluctant to interfere; since the King was a party to the prosecution the King's chancellor naturally hesitated to frustrate the operation of the King's justice; see 2 Col. Law Rev. 550. It has been suggested that equity should feel less reluctance to give relief where the proceedings have been brought *ex relatione;* see 17 Harv. Law Rev. 567; or under municipal ordinances; see 23 Harv. Law Rev. 469.

3. Davis v. American Society (1878) 75 N. Y. 362, 2 Ames Eq. Cas. 104.

4. Hackrader v. Wadley (1898) 172 U. S. 148 (federal court refused to enjoin prosecution in state court.) See also City of Bainbridge v. Reynolds (1900) 111 Ga. 758, 36 S. E. 935, discussed in 14 Harv. Law Rev. 293.

5. Manhattan Iron Works v. French (1882) 12 Abb. N. C. 446, 2 Ames Eq. Cas. 107 (enforcing Sunday closing law would ruin plaintiff's iron business). See also 26 Harv. Law Rev. 454

Where a question of fact is involved, only a preliminary injunction should be given pending the trial of such question by a jury.[6] Where no irreparable damage to property is threatened but a large number of prosecutions have been begun, equity may enjoin all save one in order to prevent a multiplicity of actions.[7] And where a party to an equity suit seeks to try the same issue by later instituting a criminal prosecution, equity will give relief.[8]

It would seem that the above reasoning should also apply to the threatened prosecution of a third party which will cause irreparable injury to the plaintiff;[9] and also the acts of police in apprehending real or supposed criminals.[10]

criticising City of Bisbee v. Arizona Ins. Ag'y (1912) 14 Ariz. 313, 127 Pac. 722, and 20 Harv. Law Rev. 238 approving the decision in Consolidated Gas Co. v. Mayer (1906) 146 Fed. 150.

6. See 14 Harv. Law Rev. 293.

7. Third Ave. R. R. Co. v. The Mayor (1873) 54 N. Y. 159, 2 Ames Eq. Cas. 102; see *post* § 447. See also 23 Harv. Law Rev. 469. As to enjoining the collection of an illegal tax, see City of Chicago v. Collins (1898) 175 Ill. 445, 51 N. E. 907, 2 Ames Eq. Cas. 92 discussed *post* § 443.

8. Mayor of York v. Pilkington (1742) 2 Atkyns 302, 2 Ames. Eq. Cas. 98.

9. In Milton Dairy Co. v. Great Northern Ry. Co. (1913) 124 Minn. 239, 144 N. W. 764 a statute forbade the shipment by any one or the receipt for shipment by carriers, of unpasteurized cream to be carried more than sixty five miles. Plaintiff's business depended upon such shipments and was being ruined because the farmers and railroad company were afraid to ship. Plaintiff contended that the statute was unconstitutional and sought to enjoin the railroad from refusing to accept goods consigned to him and to restrain prosecutions for breach of the statute. For a criticism of the decision refusing relief see 27 Harv. Law Rev. 668, 682.

10. In Phelps v. McAdoo (1905) 94 N. Y. Supp. 265 a number of policemen, suspecting gambling was going on inside a club house, broke into it and damaged it considerably; the plaintiff asked for an injunction against their continued trespass and it was given on the ground that the clause of the city charter under which they attmempted to justify their actions was unconstitutional. See 5 Col. Law Rev. 401, 611, 616. In Delaney v. Flood (1906) 183

N. Y. 323 the plaintiff was proprietor of a "Raines Law" hotel and held a liquor license. The defendant, a police captain, suspected that a disorderly house was being maintained, and stationed an officer before the establishment with orders to warn all persons about to enter that the house was likely to be raided at any time and that any one found there would be arrested. The plaintiff filed an affidavit that it was not a disorderly house and asked for an injunction. Since the question was one of fact rather than one of law it would seem that equity acted properly in refusing relief. See 6 Col. Law Rev. 345, 362; 19 Harv. Law Rev. 382.

CHAPTER V.

TRUSTS.

A. ORIGIN, HISTORY, AND CLASSIFICATION.

§ 246. Origin and history of uses.

It has been the policy of Anglo-American law that property should be freely alienable. During the twelfth century so much land had been given to religious corporations and thus taken off the land market that in 1217 Parliament passed the Statute of Mortmain,[1] forbidding such bodies to hold land. In order to evade this statute it became the custom to convey property to a close friend of the religious body who allowed the corporation to use the property as if it were theirs. At first his obligation to allow this was only a moral one but abount 1450 courts of equity—whose chancellors were at that time usually ecclesiastics—gave a remedy against him if he did not carry out his undertaking: thus what had before been merely a moral obligation became a juridically binding one.[2] The person receiving and holding the legal title in this way was called the "feoffee to uses"[3] and the beneficiary was called the *cestui que use*. Once established, uses were employed for other purposes. Since the law of forfeiture of property for treason applied only to the legal title and not to the equitable "use," it became common for the English nobility, who were frequently engaged in civil wars, to convey the legal title to some humble non-combatant, to

1. Some of the religious bodies were forbidden by their own rules to hold land. See 8 Harv. Law Rev. 127, 130. The Origin of Uses, by Professor Maitland; Tiffany, Real Property § 82.

2. Tiffany, Real Property § 83.

3. Where the conveyance was by feoffment.

hold for the use of themselves and for their families and thus avoid the loss of their property to their families in case they should be defeated in war and later tried and convicted of treason.

§ 247. Statute of uses and its results.

The employment of uses led to many evils; e. g. the creditors of the *cestui que use* could not reach his interest in order to satisfy their claims; his widow got no dower; conveyances were frequently made for fraudulent purposes and land titles became unsettled.[1]

Parliament again interfered in 1534 by passing the Statute of Uses, which was intended to put an end to these evils.[2] Instead, however, of forbidding the conveyance of land in use or making the use void, it provided that whenever A should be seized to the use of B, the legal title should be adjudged to be in B and not in A. This was called "executing the use." The statute was effectual—at least for the time and as far as it was construed to extend—in preventing the separation of the legal title and equitable interest,[3] but its most important result was the apparently unforeseen one that it was employed in the making of conveyances.[4] To convey a legal title after the statute was passed it was necessary merely to create a use in the person to whom it was intended to convey the estate; the statute of uses then operated to vest the legal title in him.

§ 248. Uses not affected by the statute of uses—trusts.

The statute was construed as not affecting uses in

1. Tiffany, Real Property § 83.

2. See 26 Harv. Law Rev. 108-127, Causes Which Shaped the Statute of Uses, by W. S. Holdsworth, who contends that the objects of the statute were (1) improvement in the King's feudal revenue, (2) a much needed improvement in the land law. And see Tiffany, Real Property § 87 for a slightly different statement of the purpose.

3. With exceptions noted *infra* § 248.

4. Tiffany, Real Property § 88.

personal property,[1] separate uses for married women[2] and those uses where the conveyance imposed active duties upon the transferee to uses.[3] These active uses came to be called "trusts" in order to distinguish them from uses which had become so important in the law of conveyancing. Several years[4] after the statute was passed it was held that if land was conveyed to A to the use of B, to the use of C, the Statute of Uses could operate only once, that is, in favor of B;[5] thus the legal title was in B to the use of C. The courts recognized this second use but called it a passive trust, to distinguish it from uses that were executed. In some jurisdictions there is legislation forbidding the creation of passive trusts in land.[6] The field of express trusts thus covers active trusts in both real and personal property, passive trusts in personal property which were unaffected by the Statute of Uses and passive trusts in land which have originated since the Statute of Uses.

§ 249. Ways in which express trusts may be created.

Express trusts may be created in any of the three following ways: (1) A conveys property to B in trust for A; (2) A conveys property to B in trust for C;

1. Because technically one is not "seised" of personalty and the words of the statute did not apply. Slevin v. Bown (1862) 32 Mo. 176 (chattels real).

2. Apparently on the theory that the one to whom the property was conveyed had a quasi-active duty to perform to protect it from the husband and his creditors, and also because it would defeat the purpose of the conveyance to vest the legal title in the woman; Tiffany, Real Property § 90.

3. On the ground that he can not perform his duties unless he retains the legal title. Kellogg v. Hale (1883) 108 Ill. 164; Tiffany, Real Property § 90.

4. Apparently about a century; see 21 Harv. Law Rev. 273.

5. See 1 Sanders, Uses and Trusts 275. Similarly, if a bargain and sale be made to B to the use of C, the use declared remains unexecuted. Tyrrell's Case (1557) Dyer 155a, Tiffany, Real Property § 90.

6. New York, Michigan, Wisconsin and a few other states; 1 Dembitz, Land Titles § 20; Tiffany, Real Property § 95.

(3) A declares himself trustee of property for C. The one who holds the legal title in trust is called the trustee;[1] the beneficiary of the trust is usually called the *cestui que trust,* in order to distinguish him from other beneficiaries, such as beneficiaries of contracts and beneficiaries of bailments.

In every express trust, therefore, there are present the three elements: (1) A trustee, (2) trust property and (3) a beneficiary. These and the necessity of other elements will be discussed later.

§ 250. Classification of trusts.

According to form trusts are either express or not express, the second class including resulting and constructive trusts. The distinction is important because the Statute of Frauds[1] applies only to express trusts.

A logical classification of trusts according to subtance or intent would result in the following divisions: (1) All actually intended trusts, whether the intention is expressed or is inferred from circumstances; (2) trusts —so called—where the obligation is imposed by equity as a remedy for a wrong, without regard to the intent of the parties and often directly contrary to such intent; (3) a middle class in which the obligations are imposed by equity according to what would probably have been the intent of the creator of an express trust if he had thought about the state of facts which later happened.[2] The second class is always called "constructive trusts;" the term "resulting trusts" is usually applied to those trusts in which the obligation is imposed according to

1. The word "trustee" is sometimes used in a very broad sense, including other fiduciaries such as bailees, executors, etc., but in this chapter it will be used in the narrow sense and the term "fiduciary" meaning one in whom peculiar confidence is reposed, will be used when the broader meaning is intended.

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1. See *post* § 268.

2. Compare the so-called conditions implied in law in the field of contracts which are imposed according to what the court thinks the parties would have intended if they had thought about it.

either the real[3] or supposed[4] unexpressed intention of the parties, thus including class (3) and part of class (1). The term "constructive trusts" is sometimes used in a broader sense to include all trusts except express trusts; and sometimes to include those trusts which are covered by classes (2) and (3) *supra*.[5] In this book the term will be used in the narrowest meaning—that is, trusts imposed without regard to the intent of the parties—for the sake of clearness and convenience.[6]

B. Trust Compared with Similar Relations.

§ 251. With a bailment.

A trust of chattels is similar to a bailment in that both the trustee and bailee are fiduciaries; that is, they are both entrusted with or have the care of property for the benefit of another, and their duty of care is practically the same, viz., that which is exercised by prudent persons with their own property under similar circumstances.[1]

If A delivers chattels to B for the use of C, B is regarded as bailee and not trustee if A intended to transfer only the possession[2] to B. In such a case C

3. See *post* §§ 283-286, purchase money resulting trusts.

4. See *post* §§ 287-289.

5. See 6 Col. Law Rev. 328; 10 Harv. Law Rev. 192.

6. For an extended discussion of classification of trusts see 27 Harv. Law Rev. 437-463.

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1. See *infra* § 321 for a more extended statement.

2. Where the person receiving the chattel is to deliver over the identical thing to the beneficiary—as, for example, where the chattel is sealed up in a bag—it is obvious that only possession was meant to pass and the transaction is a bailment and not a trust; Anonymous (1339) Y. B. 12 & 13 Edw. III 244, Ames Trust Cas. 52. In Ashley's Admin's v. Denton (1822) 1 Littell 86, Ames Trust Cas. 52, D.'s wife, during her widowhood and before her marriage to D, entrusted certain negroes to her son for the purpose of going in search of a suitable residence for her. A did not return and kept the slaves. The plaintiff now seeks to have a trust of the slaves declared. It was held that the court below improperly gave equitable relief because the trans-

has the common law remedy of detinue[3] whereby he gets the possession of the thing itself.[4] Having an adequate remedy at law he cannot sue in equity.

If in the above case A intended to transfer to B the title as well as the possession, B would become a trustee. Not having the title or legal right to possession C cannot bring detinue or any other common law action against B but must sue in equity to compel him to account for the chattel.

§ 252. With relation of principal and agent.

A trustee is like an agent in that each is a fiduciary. The main difference is that a third party who contracts with an agent is able at common law to hold his principal on such contract even tho the latter was undisclosed; whereas a third party who contracts with a trustee has no common law remedy on such contract against the *cestui que trust* even tho the existence of the latter is disclosed,[1] but must reach him, if at all, by way of equitable execution.[2] Hence, even if the duties remain substantially the same, an agent who receives the title

action was a bailment and the proper remedy was at law. Since the defendant's duty was merely to keep and return, it was not necessary that he should have title in order to perform such duty.

3. The reason why relief at law was given to the beneficiary of a bailment and not to the beneficiary of a charge (see *post* § 260), or of a contract (see *post* § 258), seems to be that the question arose early while common law procedure was still somewhat elastic.

4. Apparently in early law the bailor was not regarded as having title, but a mere legal chose in action against the bailee; 2 Blackstone Comm. 453; 6 Harv. Law Rev. 42, 10 *id.* 57, 3 *id.* 342, n. 1. At the present time if the obligation of the bailee is to return the chattel to the bailor, the bailor is considered as having title. Where the obligation is to deliver to a third party, the title probably passes at once from the bailor to the third party, subject to being divested if the third party, upon learning of the transaction, should disclaim.

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1. Everett v. Crew (1880) 129 Mass. 150; 28 Harv. Law. Rev. 736.

2. See *post* § 315. In the absence of actual authorization by the *cestui*, the liability is probably only that of the trust property, not that of the *cestui* personally.

to property to hold for his principal ceases to be an agent as to this property[3] and becomes a trustee.

§ 253. With a debt.

A trust is similar to a debt in that the obligation of either trustee or debtor may arise upon receiving the title to property.[1]

One of the important differences is that a trustee is a fiduciary, but a debtor is not. The obligation of the trustee is to hold the property for the benefit of the *cestui;* a debtor, on the other hand, may do as he likes with the property;[2] he gets the beneficial interest as well as the legal title, and his obligation is to pay a fixed sum of money out of his general assets in payment for the property he received. Hence, if trust property be lost or damaged without the fault of the trustee, he will not be liable for the loss;[3] whereas, if the property received by a debtor be lost without his fault, the loss will fall on him and it does not lessen his liability to the creditor.[4]

On the other hand, if a trustee should become bankrupt or insolvent, the *cestui que trust* is entitled to demand an accounting of the property so held in trust, if it can be found, and need not come in with the general

3. Were it not for the anomalous but well settled doctrine of undisclosed principal there would seem to be no inconsistency in a person being an agent and a trustee at the same time, the law of agency determining his rights and obligations with respect to his making of contracts and the law of trusts those with respect to his holding the property.

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1. A debt which arises upon receipt of property with the understanding that the person receiving it will pay a fixed sum therefor is called debt upon simple contract to distinguish it from debt upon a specialty or upon a record or upon a statute.

2. In the absence of fraud or other disturbing element.

3. Morley v. Morley (1678) 2 Cas. in Ch. 2, Ames Trust Cas. 502.

4. Shoemaker v. Hinze (1881) 53 Wisc. 116, 10 N. W. 86, Ames Trust Cas. 29.

creditors of the trustee.[5] In case a debtor becomes bankrupt, however, the creditor must share with the other creditors even tho the debtor still has the property he received from the creditor.[6]

§ 254. Same—payment of interest as a test.

It is often a difficult matter to determine whether a particular obligation is that of a trustee or debtor. If interest is to be paid, however, this is properly considered as showing conclusively that it is a debt and not a trust. In Pittsburg National Bank v. McMurray,[1] the plaintiffs had been accustomed to sending money to one G as their agent and attorney for the purpose of investing it, on the understanding that G was to pay interest thereon until he invested it. It was held that G was a debtor because "the agreement to pay interest necessarily implied the right to use the money" as his own,[2] and that until he had a suitable opportunity of

5. *Ex parte* Chion (1721) 3 Peere Wms. 187 note (A), Ames Trust Cas. 392.

6. Carstairs v. Bates (1812) 3 Campbell 301, Ames Trust Cas. 12 (drafts discounted become the property of the purchaser's assignee in bankruptcy).

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1. (1881) 98 Pa. 538, Ames Trust Cas. 30.

2. In *Ex parte* Broad (1884) 13 Q. B. D. 740, Ames Trust Cas. 19, N was accustomed to accept bills drawn on him by T, to charge him interest for the amount so advanced and to credit him with interest on the proceeds of bills remitted by T. On April 19, 1883, T drew a three months bill for £450 on N, which N accepted. On July 13 T sent to N a sight draft for £450 on W; this was duly collected by N. On July 20 N failed. T claims that N was trustee of the draft on W and therefore trustee of the proceeds. It was held that N was not trustee but debtor because "if a man pays interest on money he must be entitled to the use of it." In Hamer v. Sidway (1891) 124 N. Y. 538, 27 N. E. 256, Ames Trust Cas. 33, the defendants' testator X had promised his nephew Y $5000 on Y's twenty-first birthday for refraining from the use of tobacco, liquor, etc. After reaching twenty-one Y wrote X asking for the money. X answered that he "had the money in the bank for him on the day and that he should have it certain," but intimated that he preferred that Y should not actually receive the money until he was better able to take care of it. In a postscript he

investing it "he had a right to use it in any way his convenience or necessities required.[3]

§ 255. Same—a trust changed into a debt.

If a creditor consents, the debtor may change his obligation into that of a trustee provided he has the money and sets it aside for the creditor.[1] Likewise the trustee may, with the consent of the *cestui*, change his obligation into that of debtor. This may sometimes be done without the consent of the *cestui*. If A indorses and deposits in the X bank a draft on B for the purpose of collection, the X bank becomes trustee[2] of the draft for A till collection;[3] after collection, how-

added "You can consider this money on interest." The court held that it was a trust and not a debt and therefore the Statute of Limitations had not run. The decision seems sound if the interest referred to by the testator was to be paid by the bank; if it were to be paid by himself, it is difficult to see how there could be any trust. See 9 Harv. L. Rev. 160 criticising Roca v. Byrne (1895) 145 N. Y. 182, 39 N. E. 812, for failure to pay any attention to the obligation to pay interest.

3. Since a debtor is entitled to use as his own he cannot be guilty of embezzlement; a trustee is not entitled to use as his own and is therefore usually included in embezzlement statutes. Com'th v. Foster (1871) 107 Mass. 221, Ames Trust Cas. 23.

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1. In Farley v. Turner (1857) 26 L. J. Ch. 710, Ames Trust Cas. 40, the first relation of creditor and debtor (depositor and banker) was changed by the banker's making a specific application of some of the money deposited for the purpose of paying the depositor's debt to X. See 11 Harv. L. Rev. 202; 10 Col. L. Rev. 358.

2. In such cases the X bank is usually spoken of as an agent. but the law of agency determines nothing as to the kind of obligation assumed by the agent in respect to property transferred to him by his principal. As already explained, *ante* § 252, there is nothing logically inconsistent between one being an agent and trustee at the same time, but because of the doctrine of undisclosed principal, it is legally inconsistent. Hence the X bank should be called a trustee bank, not an agent bank; 18 Harv. L. Rev. 300; 22 *id.* 150.

3. In Giles v. Perkins (1807) 9 East 12, Ames Trust Cas. 9, the plaintiffs had a banking account with D, who became

ever, the bank does not need to keep apart the money so collected, but may place it with its general funds and debit itself with the amount, thus making itself a debtor. This privilege of mingling funds is allowed to the bank because it would cause great inconvenience to the banker and necessitate an increase in expense to the depositor of the draft if the sums so collected had to be kept separate.[4]

§ 256. Same—trustee liable also as if he were a debtor.

Tho usually one is liable either as debtor or as trustee and not in both capacities at the same time, a trustee may, of course, by express contract undertake the additional obligation of debtor.[1] In some jurisdictions this double liability has been imposed in certain cases in the absence of contract. If A indorses to the X bank in St. Louis a draft upon B payable in New York, the X bank will in the usual course of business indorse the draft to its correspondent bank in New York, and the latter will do the collecting; if after collection but before remitting to the X bank the New York bank

bankrupt on Nov. 18. On Nov. 12 the plaintiff had deposited in the bank three drafts indorsed by them, which were not due till the following December. Since the drafts were still uncollected at the time of bankruptcy it was decided that the plaintiffs were entitled to get them back in specie. Even tho the bank had entered the drafts as cash to the credit of the plaintiffs, this did not necessarily mean that the bank had discounted the bills. If the bank had discounted the bills, it would then have become debtor for the purchase price of the drafts and the plaintiffs would have had only a claim to share in the general assets, like any other creditor; Carstairs v. Bates (1812) 3 Campbell 301, Ames Trust Cas. 12.

4. Tinkham v. Heyworth (1863) 31 Ill. 519, 522, 9 Harv. Law Rev. 428. See also 14 Col. Law Rev. 598; 27 Harv. L. Rev. 399.

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1. An agent who sells goods on a *del crederer* commission—agreeing to become answerable at all events for the payment of the selling price to his principal—retains his liability as trustee of the money received, as in the ordinary case of agency; Wallace v Castle (1878) 14 Hun. 106, Ames Trust Cas. 25.

should fail, the X bank is held liable in some jurisdictions as if it were a debtor and thus must pay in full, though it may be able to collect only a small amount or nothing from the New York bank.[2] That the X bank retains its liability as trustee is shown by the fact that if it fails and the New York bank remains solvent, the depositor can recover the full amount due from the New York bank to the X bank, as in any other case where a trustee becomes bankrupt or insolvent.[3]

That the double liability is probably not in accord with the business understanding or business convenience is shown by the fact that banks usually stipulate against it on their printed forms.

§ 257. Same—remedies against debtor and trustee.

The early common law remedy against a debtor was debt; this was largely superseded by the action of indebitatus assumpsit[1] which was devised in order

2. Mackersy v. Ramsays (1843) 9 Clark & F. 818, Ames Trust Cas. 13 seems to be the leading case for this view. In that case M employed R. & Co. to collect a bill of exchange drawn on X of Calcutta; R & Co. employed C & Co. of London who in turn employed A. & Co. of Calcutta. A & Co. collected, gave C & Co. credit on account and became bankrupt. The court's argument was that payment to A & Co. was payment to C & Co., and that payment to C & Co. was payment to R & Co., therefore since R & Co. had been paid, they must respond to the plaintiff M. The fallacy of the argument is that even assuming the relation to be one of principal and agent, the failure of the agent to pay over money to the principal cannot properly be said to be an "act" of the agent for which the principal can be held liable to a third person as a matter of the law of agency. The fallacy becomes the more apparent when we consider that by the weight of authority the first bank is not liable for the laches of the collecting bank in failing to make the collection. Waterloo Milling Co. v. Kuenster & Co. (1895) 158 Ill. 259, 41 N. E. 906. See also 7 L. R. A. 852; 23 Harv. L. Rev. 639. In 14 Harv. L. Rev. 384, the majority view is upheld as a matter of commercial expediency because there will be only one suit instead of two.

3. See *post* § 449.

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1. This was one of the large family of actions on the case which gradually developed after the Statute of Westminster II.

to avoid the possibility of the defendant's waging his law;[2] it also had the advantage that it would lie for an unascertained amount, whereas debt lay only for a sum certain.

The early common law remedy against a trustee was account.[3] In the fourteenth and fifteenth centuries the line was drawn very closely between actions,[4] so that it was impossible to sue a trustee in debt[5] or a debtor in account.[6] Later, however, there was a tendency to break down the boundary line between actions and debt was finally allowed against a trustee,[7] the reason usually given being the clumsiness and expense of the action of account.[8] Debt would lie, of course, only where the sum was certain,[9] but still later, indebitatus assumpsit was allowed,[10] thus providing a common law remedy to a *cestui* where the sum claimed was unliquidated.[11] Allowing debt and indebtitatus assumpsit to be brought against a trustee did not, however, change the substantive law as to trusts;[12] the trustee's

2. In the various actions on the case the plaintiff was entitled to demand a jury trial.

3. See *post* § 449.

4. At that time our substantive law was shaped by the forms of action.

5. Anonymous (1405) Year Book 6 Henry IV, fol. 7, pl. 33, Ames Trust Cas. 1.

6. Anonymous (1429) Year Book 8 Henry VI, fol. 10, pl. 25, Ames Trust Cas. 2.

7. Clark's Case (1612) Godbolt 210, Ames Trust Cas. 4.

8. Largely for this reason and because equity courts could give commands to the defendant a suit in equity for an accounting has largely superseded the action of account against trustees; even where debt or indebitatus assumpsit may be brought, a suit in equity may be brought. In most juridictions the action of account is obsolete; in a few it still exists in a simplified form.

9. Lincoln v. Parr (1671) 2 Keble 781, Ames Trust Cas. 5; Farrington v. Lee (1677) 2 Modern 268, Ames Trust Cas. 6.

10. Dale v. Sollett (1767) 4 Burr. 2133, Ames Trust Cas. 7.

11. There was also the advantage at that time of avoiding wager of law which was possible in account as well as in debt.

12. Allen v. Impett (1818) 8 Taunton 263, Ames Trust Cas. 36.

obligation remained that of a fiduciary—merely a more convenient remedy was allowed to enforce it. Since the judgment in either debt or assumpsit is an unconditional one for money, these remedies will not lie except where the sole duty of the trustee—by the terms of the trust or later agreement—is to pay[13] over money.[14]

§ 258. With contract for benefit of a third person.

If A sells property to X and takes from X a promise to pay the purchase price to Y[1] instead of to A, Y is usually called the beneficiary of the contract between A and X. If the payment of the money from X to Y would result in the payment of a debt from A to Y, Y is a payment beneficiary; if it were not in payment of any obligation from A to Y, Y is usually called a sole beneficiary, on the ground that he is the only one beneficially interested in the performance of the contract. Since in case of non-performance A would be entitled to recover at least nominal damages[2] and is therefore also interested, perhaps a more appropriate term would

13. In Bartlett v. Dimond (1845) 14 M. & W. 49, Ames Trust Cas. 37, the trustee had, by the terms of the trust, a discretion as to whether he should pay over the surplus of income on Jan. 6 and July 6; it was held that indebitatus assumpsit would not lie, but he must bring his bill in equity. Only a court of equity with its power to give conditional decrees, could regulate this discretion.

14. Key v. Gordon (1701) 12 Modern 521, Ames Trust Cas. 6: "Where one receives money, and has no way to discharge himself of it but payment over, an indebitatus will lie." Whether account would lie except where the sole duty was to pay over money—*quaere*.

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1. This is the most common example of a contract for the benefit of a third person.

2. He can recover substantial damages by suing in quasi-contract for the value of what X has received from him on the faith of the promise.

be gift beneficiary.[3] At the present time[4] about two-thirds of the American jurisdictions allow the payment beneficiary to recover,[5] the leading— tho not the earliest —case on the subject being Lawrence v. Fox.[6] In about half the jurisdictions the gift beneficiary is allowed to recover.[7] In probably all the states the obligation of the promisor[8] would be carefully distinguished from that of a trustee and relief on the ground of a trust would be denied. The fundamental difficulty in finding a trust[9] in such cases is that unless and until X

3. The beneficiary of a bailment was allowed detinue probably because the question arose much earlier before procedure became crystallized. See *ante* § 251.

4. For a full discussion of the subject with exhaustive citation of English and American cases, see an article by Professor Williston in 15 Harv. L. Rev. 767.

5. It is to be observed that the payment beneficiary was in need of a remedy only in case A, the promisee—his debtor—became insolvent; and if B did become insolvent and legal execution became impossible, the payment beneficiary would be entitled—apart from the doctrine of Lawrence v. Fox—to reach this asset by a creditor's bill for equitable execution. See *post* § 455.

6. (1859) 20 N. Y. 268.

7. If the gift beneficiary is denied a remedy against the promisor, he has obviously no remedy whatever at law; and since the promisee cannot recover full damages on the contract, it would seem to have been desirable to give the equitable remedy of specific performance to the gift beneficiary; if this had been done, the promisee would have been made a party and all three parties would have been concluded by the decree.

8. Altho the remedy given to the payment or gift beneficiary is special assumpsit and not indebitatus assumpsit, the obligation of the promisor is the same as that of an ordinary debtor—to pay out of his general assets.

9. It has been suggested that A, the promisee, is a trustee for the beneficiary. This seems unsound because there is no intent on his part—either express or implied from circumstances—to become a trustee. He undertakes no positive duty whatever. The money is to be paid to the beneficiary, not to him. Where the beneficiary is allowed an action, the promisee must account for any payment received by him, but this is because he has violated his negative duty to keep his hands off. As the substantive law has developed, he has no right to rescind or collect after the beneficiary assents; and before the beneficiary assents he may either rescind or he may collect and ignore

has the money set aside, there can be no trust property.[10] As soon as the money is thus set aside for the beneficiary with the assent of the promisee, the promisor's obligation changes at once into that of a trustee.[11]

§ 259. Same—English cases.

In England—probably because of the continued refusal of common law courts to give any remedy to a gift beneficiary[1]—equitable relief has been given on the ground of a trust, thus making the English law of trusts illogical on this point. In Moore v. Darton[2] Moore

the beneficiary. In other words he never sues as trustee; he either has a right to sue as beneficial owner and as party to the contract, or has no right to sue at all.

10. Steele v. Clarke (1875) 77 Ill. 471, Ames Trust Cas. 44; "It is true that when property is conveyed or given by one person to another, to hold for the use of a third person, such a trust would thereby be created as would give equity jurisdiction to compel the application to the purpose of the trust. But such is not this case. Here was a sale of a farm by the owner in order to pay his debts among which was this debt due his brother Thomas, and which Brewster refused to pay . . . We fail to see in the transaction any indication of a trust to any greater extent than any ordinary assumpsit by one person for a valuable consideration, to pay a debt he owes to a third party, instead of paying to the party with whom he contracted." In *In re* Caplen's Estate (1876) 45 L. J. Rep. 280, Ames Trust Cas. 49 it was held that "a mere agreement on the part of the debtor to apply the money according to the direction of the creditor" was not enough to establish a trust in favor of the gift beneficiaries.

11. In *In re* Barned's Banking Co. (1870) 39 L. J. Ch. 635, Ames Trust Cas. 42, M had paid into B's bank a sum of money to be remitted to P to take up a bill which M owed. The next day B's bank stopped payment without having made the remittance to P. The money not having been set aside it was held that B—who had later paid P—must come in with the general creditors. In Farley v. Turner (1857) 26 L. J. Ch. 710, Ames Trust Cas. 40 the relation of depositor and banker was changed by the latter's making a specific application of some of the money deposited for the purpose of paying the depositor's debt to X. See *ante* § 255, note 1.

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1. As already explained, a payment beneficiary is in no real need of a remedy. See *ante* § 258.

2. (1851) 4 DeG. & Smale 517, Ames Trust Cas. 39.

borrowed £100 of Miss Darton and gave the following receipt: "Received the 22nd of October, 1843, of Miss Darton, for the use of Ann Dye one hundred pounds, to be paid to her at Miss Darton's decease, but the interest at 4% to be paid to Miss Darton." This transaction was held to create a trust "for Miss Darton during her life, and for Ann Dye after Miss Darton's death." Since interest was to be paid to Miss Darton it seems impossible to find a trust during her life time;[3] conceivably a trust might have arisen for Ann Dye at Miss Darton's death if it were shown that Moore at that time set aside the amount for her,[4] but there is nothing to show that this occurred.[5]

§ 260. With an equitable charge.

If A grants land to B reserving a charge[1] thereon, or if he grants a charge to B, keeping the land, the charge thus created becomes a legal incumbrance[2] on the land and is usually called a legal charge. But if A should convey[3] the land to B subject to a charge[4] in favor of C, the latter, not being a party to the trans-

3. See *ante* § 254.

4. And that it was assented to by Ann Dye or that the assent of Miss Darton could be inferred from the receipt.

5. In McFadden v. Jenkins (1842) 1 Phillips 153, Ames Trust Cas. 47, W had lent £500 to defendant J to be returned in a short time. Later W sent an oral direction to J to hold in trust for plaintiff M. J assented and paid M £10. The court held that there was a trust tho it seems quite clear that J's obligation was merely to pay out of his general assets; he had not set any money aside.

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1. The charge is usually in the form of an annuity.

2. In a figurative sense the land becomes a debtor; the remedy of the holder of the legal charge is to distrain.

3. Usually by will.

4. If the words are "B paying" they are usually construed as creating both a personal obligation on B and an equitable charge on the land; Porter v. Jackson (1883) 95 Ind. 210. Tho C is really a gift beneficiary of this personal obligation—see *ante* § 258—he seems to have been allowed to bring debt or *indebitatus assumpsit* and was not required to bring special assumpsit; Etter v. Greenwalt (1881)

action, but merely a beneficiary, was denied any remedy at law; equity gave relief and hence C is said to have an equitable charge. Where property is conveyed to B "upon trust to pay C" a sum of money the situation is similar in that B has the legal title in each case and C's remedy in each case is exclusively equitable. The chief difference is that in the case of the trust B is a fiduciary, and owes positive duties toward C with respect to the property,[5] whereas in the case of the equitable charge B is not a fiduciary and with respect to the property merely owes C the negative duty[6] not to destroy his charge by conveying it to a *bona fide* purchaser for value without notice.[7]

98 Pa. 422. The personal obligation is not limited in amount to the value of the property received. Porter v. Jackson, *supra*. And since it is to be paid out of B's general assets and not out of any of the property received, a conveyance "to B" was construed to give him a fee and not a life estate; Walker v. Collier (1595) Croke Eliz. 379, Ames Trust Cas. 3.

5. Hence, if he should wish to buy a release of C's trust interest, it would be necessary to divulge to C all information which he had acquired by nature of his being trustee; see *post* § 321. Also, the Statute of Limitations will not begin to run in his favor till he repudiates the trust to the knowledge of C; Jacquet v. Jacquet (1859) 27 Beav. 332, Ames Trust Cas. 56.

6. Therefore he may deal at arms' length with C in buying C's interest; and it has been held that C has no claim upon insurance money received by B upon the destruction of a building on the land. Whitehouse v. Cargill (1896) 88 Me. 479. And since the duty of B is merely to pay and not to keep the property for the benefit of C, statutes of limitation will usually run from the moment the payment becomes due; Hodge v. Churchward (1847) 16 Simon 71, Ames Trust Cas. 55; and see 3 Col. L. Rev. 498.

7. Apparently he may freely alienate the property if he informs the prospective purchaser of the existence of the equitable charge; see 26 Harv. L. Rev. 559; but it is a breach of trust for a trustee to alienate trust property to any one without the assent of the *cestui* or an order of court. See *post* § 328.

§ 261. With the assignment of a chose in action.

If A assigns a non-negotiable[1] chose in action to B, B does not get the legal title[2] unless the obligor assented to the transfer, agreeing to pay B instead of A;[3] the legal title remains in A but B has the beneficial interest.[4] If instead of assigning the chose in action to B, A had declared himself trustee of it for B, the case would be similar in that A has the legal title and B has the beneficial interest.

The chief difference between the two cases is that in the case of the assignment A is not a fiduciary; he has no positive duties to perform but is under the negative duty not to interfere with B's beneficial in-

1. If the chose in action is negotiable, the obligor assents in advance to the transfer and hence title passes.

2. A chose in action being a relation between obligee and obligor, it can not be fully and completely transferred—apart from statute—except by consent of both. There is such a statute in England, which provides for the passing of legal title at the time written notice is given to the obligor; Eng. Jud. Act, 37 Vict. c. 66, Sec. 25, subsec. 6. It has been contended, however, that the substantive law has so evolved as to give the assignee legal title instead of merely a power of attorney to collect. 29 Harv. Law Rev. 816-837; 30 *id.* 449-485 Alienability of Choses in Action, by W. W. Cook. But see 30 Harv. Law Rev. 99, Is the Right of an Assignee of a Chose in Action Legal or Equitable, by Samuel Williston.

3. This is transfer by novation. Unfortunately the transaction is called an assignment whether the obligor does or does not assent.

4. The assignment of a non negotiable chose in action is frequently called an "equitable" assignment. This is because the right of the assignee was first recognized in equity. In Squib v. Wyn (1713) 1 P. Wms. 378 the court states that "choses in action are assignable in equity but not at law" as if it were then well settled. The common law courts, jealous of the growing jurisdiction of chancery, overcame their scruples as to maintenance and gave relief to the assignee by employing a device borrowed from the Roman Law—a power of attorney for the attorney's own benefit. About 1800 equity abandoned its jurisdiction—Hammond v. Messenger (1838) 9 Simon 327, Ames Trust Cas. 59—so that it is no longer accurate to call it an "equitable" assignment, but the term persists and tends to confuse the subject; see 3 Col. Law Rev. 581. As to choses in action which are not assignable because the obligation is something else than the payment of money, see 7 Col. Law Rev. 34.

terest. In the case of the trust, however, A is the proper person to collect[5] the chose in action[6] and B has no remedy directly or indirectly against the obligor as long as A performs his duty as trustee.[7] In the case of the assignment A's duty is not to sue the obligor but to allow B to sue as his representative and keep the money collected. Before it was changed by statute,[8] B was compelled to sue in the name of A; now he is generally allowed to sue in his own name but he still sues as the representative of A. He has no remedy in equity unless A threatens to collect from the obligor or there is some other special circumstance requiring equitable interference.[9]

In the case of the trust the obligor will be protected in paying the trustee unless he knows that the trustee is about to commit a breach of trust;[10] while in the case of the assignment the obligor will not be protected in paying the assignee unless he was ignorant of the assignment.

§ 262. Same—partial assignments.

It is a fundamental principle of all systems of law that a cause of action shall not be split up into parts so

5. And in the receipt given by the trustee to the obligor he need not add the word "trustee" after his name; Thomassen v. Van Wyngaarden (1885) 65 Iowa 687, 22 N. W. 927, Ames Trust Cas. 68.

6. Roberts v. Lloyd (1840) 2 Beav. 376, Ames Trust Cas. 66. In this case the obligee did not declare himself trustee of the chose in action but assigned it in trust; hence the trust property was the power of attorney to collect the chose in action.

7. If the trustee fails or refuses to collect, the *cestui que trust* may sue him for breach of trust and if the obligor is within the jurisdiction the latter may be enjoined so as to settle it all in one suit; Fogg v. Middleton (1837) 2 Hill (Ch.) 591, Ames Trust Cas. 65. See *post* § 326.

8. These statutes usually provide that actions shall be brought in the name of the real party in interest. For a discussion of the effect of these statutes see 4 University of Missouri Law Bulletin 3-38.

9. Hammond v. Messenger (1838) 9 Simon 327, Ames Trust Cas. 59.

10. See *post* § 278.

as to subject the obligor to more than one suit unless he consents to such a division. The result of this is that if the obligee sues on a part only of a cause of action and takes judgment thereon, he cannot sue later to recover the remainder.[1] If the obligee attempts to assign a part of the cause of action the rule forbidding that a debtor be harassed by more than one suit against his consent would prevent the bringing of two suits,[2] one by the part assignee and the other by the obligee. On the other hand, the attempted division ought not to result in the debtor's escaping liability. The rule is settled everywhere, therefore, that an attempted part assignment has no effect at common law[3] unless the obligor agrees,[4] and hence the assignor may recover as if no partial assignment had been attempted. In equity, however, the partial assignee is given the right[5] to sue the other two parties[6] and the result is that from the moment the obligor has notice[7] of the part assignment,

1. Ewart, Estoppel (4th ed.) 182 note. The rule applies even tho the failure to sue for the entire demand was the result of mistake; Wickersham v. Whedum (1863) 33 Mo. 561. Perhaps it might be urged that the obligor should make his objection at the beginning of the suit and not later, but the rule as stated in the text seems well settled.

2. The power of attorney device does not help here, because if the obligee can bring only one suit, he cannot authorize the partial assignee to bring a suit and at the same time retain for himself the right to sue; see 7 Harv. Law Rev. 313.

3. See 4 Cyc. 27; Love v. Fairfield (1850) 13 Mo. 300.

4. The debtor may consent to the division, in which case separate suits may be brought; Gordon v. Jefferson City (1904) 111 Mo. App. 23, 85 S. W. 617. Only the debtor may object to the part assignment; Johnson Co. v. Bryson (1887) 27 Mo. App. 341.

5. See 4 Cyc. 27-35; 4 Cent. Dig. 1196-1203. Missouri and possibly a few other states deny this relief; Bennett v. Crandall (1876) 63 Mo. 410.

6. The obligor is the only one who could conceivably object to this; he might properly object if the suit in equity imposes a greater burden on him than an action at law. While it may have been true that the burden was heavier a century and a half ago when an equity trial was by depositions and not in open court, it is no longer worthy of consideration because in practically all jurisdictions the procedure and trial in equity do not differ substantially from a trial at law.

7. It has sometimes been held that notice is essential to the

he is under obligation not to pay the whole amount to the obligee. While justice requires that he shall have only one suit to defend, it is no substantial increase in his burden to require him to separate what he owes into two parts, paying part to the obligee and part to the partial assignee.

Tho equity takes jurisdiction[8] in partial assignment cases an obligee who has made a partial assignment is not a trustee;[9] his sole duty toward the partial assignee is the negative one of not interfering with the latter's collecting his part of the chose in action.

§ 263. With an executorship.

The executor of a will is like a trustee in that he is also a fiduciary; his duty is to deal with the property[1] of the deceased for the benefit of the creditors[2] and the legatees of the testator; as executor he has no beneficial interest in the property.[3] If a will directs that the person appointed as executor shall do other things than an executor is under obligation to do, he

assignment and is not merely for the purpose of protecting the partial assignee from the obligor's paying the obligee. For a criticism of this see 3 Col. Law Rev. 581, 590, 4 *id.* 302.

8. Equity jurisdiction is based upon the inability of a common law court to deal with a three-sided suit; see *ante* § 5.

9. If the obligee should declare himself trustee of the chose in action partly for the benefit of B and partly for the benefit of himself, the obligee would of course become a trustee; if instead he should assign the entire chose in action to B upon trust partly for the benefit of the obligee, and partly for the benefit of B, the assignee would become a trustee. Either of these devices may be used in a jurisdiction like Missouri which refuses equitable relief to the partial assignee.

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1. The executor primarily deals only with the personal estate, but where that is not sufficient to pay debts, modern statutes provide that he may have enough of the real estate sold to make good the deficiency.

2. Scott v. Jones (1835) 4 Clark & F. 382, Ames Trust Cas. 70

3. The rule was formerly otherwise in England, where he was the residuary legatee.

becomes a trustee[4] as soon as such duties are undertaken.[5]

The legatee's remedy against the executor is in the probate court; but if the executor has become a trustee he becomes liable, like other trustees, to a suit in equity[6] and the legatee must look for payment to the sum set aside[7] and not to the general assets of the deceased. The executor holds adversely to the creditors and the legatees because the duty of the executor is to settle up the estate as promptly as the circumstances will permit; hence the creditors and legatees may be barred by the running of the Statute of Limitations tho they did not even know of the existence of their respective claims against the estate. But if the executor becomes trustee, this Statute of Limitations does not apply to his obligation as such trustee,[8] and the Statute of Limitations in reference to a trust will not begin to run till the trustee has repudiated to the knowledge of the *cestui*, because his duty is to continue to hold the property for the benefit of the *cestui* and the latter is entitled to

4. Hence a person may be both executor and a trustee at the same time, with reference to different parts of the estate, his duties in the two capacities remaining entirely distinct. If the executor should die the better view is that the administrator *de bonis non* does not succeed to the trust duties; 20 Harv. Law Rev. 151.

5. If the executor can not legally pay over a legacy because of the infancy or other disability of the legatee, he becomes trustee as soon as he has the amount ready to pay over and is bound by the ordinary duties of a trustee, such as investment (see *post* § 322); *In re* Smith (1889) 42 Ch. D. 302, Ames Trust Cas. 72. But see 19 Harv. L. Rev. 383 placing *In re* Smith on the ground of the Conveyancing Act.

6. Parsons v. Lyman (1863) 32 Conn. 566.

7. Brougham v. Poulett (1854) 19 Beav. 119.

8. Tyson v. Jackson (1861) 30 Beav. 384. The creation of a trust to pay debts will not, however, affect the application of the Statute of Limitations as to debts where the property was already legally liable therefor. In the United States this includes both real and personal estate, but only personal property in England. Scott v. Jones (1838) 4 Clark & F. 382, Ames Trust Cas. 70.

notice if the trustee decides to claim the property for himself.[9]

§ 264. With relation of vendor and purchaser.

A vendor of land under a specifically enforcible contract[1] is frequently spoken of as a constructive trustee;[2] the relation is similar to that of a trust in that the vendor has the legal title and the purchaser the equitable interest in the property.[3] If the purchase money has been paid or secured according to the contract the vendor is under an obligation to turn over the property to the purchaser, but this is not a constructive obligation but one which the common law imposes and for which equity gives specific redress according to the intention of the parties. The obligation is closely analogous to that of an express passive trustee whose duty is merely to convey, but it is not exactly that because there is no intention to become a trustee. Where the purchase money has not been paid or secured it is still farther from being an express passive trust because the vendor has an interest in holding the property as security which is not quite consistent with his being a trustee.

C. Essentials to the Creation and Existence of the Trust Relation.

§ 265. Language necessary to creation of a trust.

If one who attempts to create a trust uses the phrase "upon trust" or words of command, the attempt will ordinarily be successful, if the property conveyed has been properly described and there are no conditions

9. See 9 Col. Law Rev. 89 approving Russell v. Huntington Nat'l Bk. (1908) 162 Fed. 686; see also 7 Harv. Law Rev. 439.

1. See *ante* § 83.
2. See 1 Col. Law Rev. 1, 6.
3. See *ante* §§ 83, 109, note 5.

imposed upon the transferee which would be inconsistent with a trust—such as the payment of interest.[1]

If only precatory words are used—such as "wish," "hope," "desire," "entreat," etc.,—there is some uncertainty as to whether they are sufficient to impose a trust obligation on the transferee of the property. Formerly the weight of authority was that such words, if used in a will, were sufficient provided the subject matter and object of the trust be clearly designated.[2] The tendency of modern cases, however, is against construing such words as creating a trust, requiring that the language used be strong enough to show an intent to impose a legally binding instead of a merely honorable obligation.[3]

1. See *ante* § 254.

2. In Harding v. Glyn (1739) 1 Atkyns 469, Ames Trust Cas. 78, one N. H. gave by will "to Elizabeth, his wife, all his estates, leases and interest in his house in Hatton Garden and all the goods . . . ., plate, . . . but did desire her at or before her death to give such leases, house, furniture, goods and chattels, plate and jewels unto and amongst such of his own relations as she should think most deserving and approve of." It was held that the widow took as trustee and got no beneficial interest. In Palmer v. Scribb (1713) 2 Eq. Cas. Abridged 291, pl. 9, Ames Trust Cas. 77, no trust was construed because the words of the will covered property of the wife other than that received from the husband. In Wynne v. Hawkins (1782) 1 Browns Ch. Cas. 179, Ames Trust Cas. 81, "not doubting that she will dispose of what shall be left at her death to our two grandchildren" was not construed to impose a trust because "it was uncertain what property was to be given and to whom." In Malim v. Keighley (1749) 2 Ves. Jr. 333, Ames Trust Cas. 83, "recommending it to her to dispose of the same after her own death to" certain persons was construed to impose a trust. A partial explanation of this attitude of the courts is that they thought a testator would be unlikely to use words of command towards a wife or near blood relative; and that the wish of a testator, like the request of a sovereign, was equivalent to a command; see 11 Harv. L. Rev. 261, 482.

3. In *In re* Diggles (1888) 39 Ch. Div. 253 Mary Ann Diggles bequeathed all her real and personal estate to her daughter, F. E., "and it is my desire that she allow to my relative and companion, Anne Gregory, now residing with me, an annuity of £25 during her life." This was held not to create a trust. See also Lambe v. Eames (1871) 6 Ch. App. 597, Ames Trust Cas. 85; Stead v. Mellor (1877) 5 Ch. Div.

§ 266. Consideration—the law of uses.

It was the law of uses before the Statute of Uses[1] was passed that a consideration was necessary to create or "raise" a use.[2] If A conveyed property[3] to B, for the use of C, the receipt of the property by B was consideration[4] for his obligation to hold it to the use of C.[5] If A desired to create a use in C without making any conveyance of the legal title, his having the property could not be consideration for raising the use because he already had the property[6] and therefore unless A received something of value, such as money, etc., in exchange for his promise to hold to C's use, such a promise was wholly ineffectual.

After the Statute of Uses was passed and uses became important in the law of conveyancing[7] the rule requiring consideration was so modified that one might create a use in favor of a near relative[8] by blood or

225, Ames Trust Cas. 91. If a testator wishes to give full power of disposition to X and yet give what is left of the property at X's death to Y, he should give X a life estate with a general power of appointment, but in default of appointment, over to Y.

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1. See *ante* § 247.

2. Doctor & Student (1523) Dialogue II, Chapters 22, 23, Ames Trust Cas. 107.

3. If the conveyance was by feoffment, no consideration was necessary for the validity of the feoffment; Ames Trust Cas. 108.

4. The essential idea involved in consideration is that of exchange. In the law of conveyancing, the consideration for the conveyance is that which is given in return for the property. See Doctor & Student, *supra*.

5. Once a use was created or "raised"—i. e. once the beneficial interest was separated from the legal title—the use could be transferred freely by way of gift; that is, without consideration.

6. That so called "past" consideration was not sufficient, see Anonymous (1545) Ames Trust Cas. 109.

7. See *ante* § 247.

8. This was a strict requirement. There could be no covenant to stand seized to the use of a bastard child. Frampton v. Gerrard (1601) 2 Roll's Abridg't 785 (K) pl. 4, 791, pl. 1 Ames Trust Cas. 121. In case of a covenant to stand seized to the use of a near relative for life, remainder to a stranger, the re-

marriage—such as son, daughter, son-in-law, daughter-in-law—by a mere declaration under seal[9] without receiving anything in exchange. The Statute of Uses would then operate to transfer the legal title to the relative in whom the use had been thus created. Such a conveyance is called a covenant to stand seised; the near relationship upon which it is based is usually referred to as "good consideration." Strictly speaking, however, there is no consideration in the true sense of exchange; sometimes consideration in the latter sense is called "valuable" consideration to distinguish it from the so called "good" consideration. Where a use is raised by a valuable consideration,[10] the conveyance is called a bargain and sale.

§ 267. Same—the law of trusts.

Until 1811 a valuable consideration was essential to the creation of a trust.[1] In that year it was decided[2] that if A declare himself trustee for X, this mere declaration is sufficient to make A trustee and to vest the equitable interest in X even tho X be a stranger.

It has long been the law as to gifts that in order to

mainder was void; Anonymous, 2 Roll's Abridg't 78, Ames Trust Cas. 122. And a recital of relationship is not sufficient, tho a recital of a valuable consideration is sufficient to make a good bargain and sale. Taylor v. Vale (1889) Croke, Eliz. 166, Ames Trust Cas. 117.

9. In the leading case of Sharington v. Strotton (1565) Plowden 298, Ames Trust Cas. 109, the promise was under seal, but the court laid no stress on the fact. But in Callard v. Callard (1596) Moore 687, pl. 950, Ames Trust Cas. 117, it was decided that a seal was necessary.

10. Apparently it is the recital of consideration rather than the fact of consideration that is the most important thing in a bargain and sale; Taylor v. Vale *supra*.

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1. See 9 Harv. Law Rev. 213.

2. *Ex parte* Pye (1811) 18 Ves. 140, Ames Trust Cas. 123. In that case the giving of a power of attorney was construed as a declaration of trust. On that point the decision would probably not be followed. See *infra* note 6.

transfer the legal title the donor must either deliver the property[3] or make a conveyance by deed or will; a mere promise or declaration of intention, no matter how clear, will not suffice. After it was held that a mere declaration of trust was enough, it was natural that the donee of every imperfect gift would try to induce the court to construe the transaction to be a declaration of trust, which for most purposes would be as satisfactory to the donee as the legal title would be. In a few English cases[4] the donees were successful, but the great weight of authority and the better view is that the doctrine of *Ex parte* Pye is applicable only to cases where there is a clear intent to become trustee[5] and therefore does not apply to imperfect gifts.[6]

An exception, however, has grown up in the United States. Apart from statute, a husband can not convey property to his wife; an attempt to do so has no legal effect. In many jurisdictions in the United States,

3. Irons v. Smallpiece (1819) 2 B. & Ald. 551; 4 Harv. L. Rev. 140. If the chattel is already in the hands of the donee as bailee oral words of gift are enough; See 20 Harv. Law Rev. 306.

4. Morgan v. Malleson (1870) 10 Eq. 475, Ames Trust Cas. 129; Richardson v. Richardson (1868) 3 Eq. 686, Ames Trust Cas. 156.

5. Richards v. Delbridge (1874) 18 Eq. 11, Ames Trust Cas. 130. See 9 Harv. Law Rev. 213.

6. Many of the cases of imperfect gifts are of choses in action, which are, of course, incapable of delivery because intangible. As already pointed out, *ante* § 261, legal title can be transferred only by novation, so that the device of a power of attorney for one's own benefit was resorted to in order to transfer the beneficial interest. This power of attorney is held to be irrevocable in case the chose in action is sold, but the law as to gifts is not so well settled. If a legal chose in action is evidenced by a document—such as a life insurance policy, bond, savings bank book—the production of which is essential to enable a plaintiff to recover thereon against the obligor, and this document has been transferred by deed or delivery to the donee, the power of attorney is held to be irrevocable in this country; Grover v. Grover (1835) 24 Pick. 261, Ames Trust Cas. 159, 145 note. In England this seems to be true only in case of gifts *mortis causa;* Edwards v. Jones (1836) 1 Mylne & Craig 226, Ames Trust Cas. 140; except perhaps as to life insurance policies; Fortescue v. Barnett (1834) 3 Mylne & Keen 36, Ames Trust Cas. 136. Where there is no such document the few de-

however, these attempts to convey to the wife have been upheld in equity as valid declarations of trust.[7] These decisions are usually explained as being based upon the husband's obligation to make a provision for the wife and therefore as having a meritorious consideration; tho not logical they are probably justified in the United States on grounds of policy, because the wife is not usually provided for upon her marriage as she is in England.[8]

§ 268. The Statute of Frauds.

Apart from statute, a trust either of real or personal property may be created orally and may be proved by oral evidence. In a few states the Statute of Frauds provides that trusts in land shall be created in writing.[1] But by the English Statute of Frauds,[2] which has been substantially copied in many States, the requirement is that "all declarations or creations of trust or confidences of any lands, tenements or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trusts. . . ." The statute by its terms does not apply to

cisions are in conflict; Colman v. Sarrel (1789) 1 Ves. Jr. 50, Ames Trust Cas. 133, 163, note. In case of equitable choses in action, where, of course, there is no such document, mere words of transfer seem to be enough; Donaldson v. Donaldson (1854) Kay 711, Ames Trust Cas. 146; Sloane v. Cadogan (1808) Sugden, 3 Vendors & Purchasers (10th Ed.) Appendix, 66, Ames Trust Cas. 135.

7. Walker v. Walker (1857) 25 Mo. 367, Ames Trust Cas. 175 note.

8. The modern English view is shown in *In re* Breton's Estate (1881) 17 Ch. D. 416, Ames Trust Cas. 171, refusing to construe a trust in the case of an attempted gift from husband to wife. There were some earlier cases *contra*: Slanning v. Style (1734) 3 P. Wms. 334, Ames Trust Cas. 164, Baddeley v. Baddeley (1878) Ames Trust Cas. 170.

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1. See Rev. Stats. of Alabama (1886) § 1845.
2. (1676) Statutes at Large 406.

personal chattels;[3] and resulting and constructive trusts are expressly excepted.[4]

Unless the statute expressly requires that the creation of the trust shall be in writing, the writing is not necessary to the creation but merely to the enforcement of the trust; that is, the statute gives a defense. The memorandum is thus sufficient if made at any time before suit is brought to enforce the trust and is effectual even if made after the trustee's bankruptcy provided that the trust was created before the bankruptcy.[5]

If A conveys property to B upon trust for C, A may comply with the statute by expressing the trust in the instrument of conveyance. If he fails to do this, however, only B can then comply with the statute, since he is the party to be charged with the trust.[6] If A declares himself trustee of land for C, the only party who can ever comply with the statute is A.

3. Danser v. Warwick (1880) 33 N. J. Eq. 133, Ames Trust Cas. 186 (bond and mortgage; the fact that the mortgage was on land was not material because it was incident to the debt).

4. See *ante* § 250.

5. In Gardner v. Rowe (1825) 2 Simon & Stewart 346, Ames Trust Cas. 179 the bankrupt trustee attempted to perform by conveying; the invalid deed was held to be a sufficient memorandum to comply with the statute; see 14 Harv. Law Rev. 156. In Lockren v. Rustan (1899) 9 N. D. 43, 81 N. W. 60, X for the purpose of defrauding his creditors conveyed land to his son upon an oral trust for himself. In order to get the property out of the reach of his own creditors, the son reconveyed to X. This reconveyance was held valid as against the son's creditors, tho X could not have compelled it; see 13 Harv. L. Rev. 608. As to how far the performance of an oral ante-nuptial contract by the husband to convey property to the wife in consideration of marriage is good against the husband's creditors see 11 Harv. L. Rev. 417, 12 *id.* 219, 15 *id.* 239.

6. In Tierney v. Wood (1854) 19 Beav. 330, Ames Trust Cas. 182, W bought land and caused it to be conveyed to the plaintiff; later he delivered to the plaintiff a writing signed by himself as follows: "I desire that the property be held for the benefit of my wife. . . ." The court treated the case as if a question of complying with the Statute of Frauds was involved and stated that the holder of the beneficial interest was the proper party to

§ 269. The subject matter of a trust.

Tho most trusts are of land, movable chattels and choses in action[1] may also be held in trust. The *cestui's* interest itself being an equitable chose in action, may be held in trust.[2] In short, practically everything of which one may predicate property may be held in trust.[3]

Purely personal rights, such as peerages[4] and offices, cannot be assigned to others and therefore cannot be held in trust for others. In Graves v. Graves[5] the testator devised his homestead Gravesend to his wife for life: "And I do hereby declare it to be my earnest wish and desire that my said sister shall reside at Gravesend with my dear wife during her life." The sister asked for a declaration of her right to reside at Gravesend and to be boarded by Mrs. Graves. The court held that there was no trust property and hence no trust obligation. The homestead itself was evidently not meant to be held in trust and the right to live at Gravesend being conditional upon the sister being able to live on friendly terms with the widow, was obviously not enforcible.[6]

sign the memorandum. The explanation of the case is that there was a purchase money resulting trust (see *post* § 282.), the proof of which did not involve the Statute of Frauds; see *ante* § 250. The beneficial interest being effectually vested in W, the writing operated as an assignment of that interest; obviously the holder of the beneficial interest is the proper party to *assign* the interest.

1. Fogg v. Middleton (1837) 2 Hill Ch. 591, Ames Trust Cas. 65.

2. Goodson v. Ellison (1827) 3 Russ. 583, Ames Trust Cas. 451.

3. That the property is not in existence at the time the trust is created is not material; see Pratt v. Tuttle (1883) 136 Mass. 233, Ames Trust Cas. 32, where the trust property was one half of the net profits to be made in a business.

4. Buckhurst Peerage (1876) 2 App. Cas. 1.

5. (1862) 13 Irish. Ch. 182, Ames Trust Cas. 192.

6. A direction by the testator to his executors to employ a certain solicitor in settling up the estate cannot be sustained as a

§ 270. The cestui que trust—public or charitable trusts.

Any person capable of holding the legal title to property may be a *cestui que trust.*[1]

A charity has been defined as anything which tends to the improvement of mankind[2] in general, including schools, churches, lodges, hospitals, libraries, etc. The rules as to charitable trusts differ in two important respects from the rule as to private trusts: the *cestuis que trust* need not be definite,[3] and the trust may last forever. A devise of property to X upon trust to apply the income each year for the benefit of the worthy poor of Z county is valid, tho it is obvious that the parties to

trust because there is no trust property; Foster v. Elsley (1881) 19 Ch. D. 518, Ames Trust Cas. 191. Another objection to it is that the necessity for co-operation between client and attorney makes it undesirable to attempt to enforce it; 28 Harv. Law Rev. 530. In a somewhat less degree the same objection would apply to employments other than that of legal services; see Jewell v. Barnes Adm'r (1901) 110 Ky. 329, 61 S. W. 360.

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1. At one time it was held that an alien could take, but not hold property as *cestui que trust.* King v. Sands (1669) Freem. Ch. 129, Ames Trust Cas. 354. This has been almost entirely abrogated by statute. Nor could a slave be a *cestui;* Craig v. Beatty (1879) 11 S. Ca. 375.

2. See 3 Col. L. Rev. 269-273, quoting Jackson v. Phillips (1867) 14 Allen 539, 556. In Jones v. Palmer (1895) 11 The Times Law Rep. 519 the bequest of a fund to a yacht racing association to apply the income to purchase each year a cup etc., was held not to be a charity. In Kelly v. Nichols (1893) 18 R. I. 62, 25 Atl. 840, a devise for hospitality was held not be a charity; 7 Harv. L. Rev. 125. Similarly a society for the benefit of members irrespective of poverty is not a charity; 22 Harv. L. Rev. 610. But the suppression of vivisection is a charitable object because the advancement of human morals is involved; 9 Harv. L. Rev. 224. As to patriotic trusts, see 20 Harv. L. Rev. 67.

3. The rule in New York and a few other states formerly was otherwise; Tilden v. Green (1891) 130 N. Y. 29, 28 N. E. 880, 887. The failure of this trust because the property was devised to a corporation not yet in existence caused much criticism—5 Harv. L. Rev. 389—and led to corrective legislation. See Acts 1893, ch. 701. See 2 Col. L. Rev. 10; 11 *id.* 559.

be benefitted are not specified and tho the income is to be applied perpetually. In fact, it is one of the essential features of a charity that the persons to be ultimately benefitted thereby should not be specified because it must be for the benefit of the public.[4] If a charitable corporation[5] is named as the immediate *cestui*, it is the proper party to enforce the trust; otherwise the state will enforce it—usually through the Attorney General.[6]

§ 271. Same—private trusts.

If a trust is for a private purpose, it is a fatal objection if the application of the income is to last indefinitely.[1] In Mussett v. Bingle[2] a direction that the income from £200 be used in keeping up a monument was held bad for this reason. If the trust had been limited to a period of years—say twenty[3]—it might have

4. See 12 Col. L. Rev. 356, 379, a devise "to provide shelter, necessaries of life, education, general or specific, and such other financial aid" as might seem fitting to the trustees was held valid.

5. Where the devise or bequest is to an unincorporated society, the trust should be held valid, but the law is unsettled; see 19 Harv. L. Rev. 202; 2 Col. L. Rev. 58.

6. In two other respects a charitable trust differs from a private trust: (a) The rule of *respondeat superior* does not apply to a corporation engaged in a charitable purpose; Arkansas Midland R. R. Co. v. Pearson (1911) 98 Ark. 399, 135 S. W. 917 (charitable hospital); see also 25 Harv. L. Rev. 83, 16 *id.* 530. (b) If it becomes impossible or highly difficult to carry out the original charitable purpose and the main object of the bequest was a general charitable purpose, the property will be devoted to some similar charity. See 8 Harv. L. Rev. 69-92, 11 Col. L. Rev. 773, 12 *id.* 356. This is called the doctrine of *cy pres*.

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1. This is a perpetuity in the strict and literal sense. It is bad because it would tend to withdraw property from proper and normal economic uses. A provision that will result in property being rendered entirely useless even for only a limited period is bad; Brown v. Burdett (1882) Weekly Notes 134, Ames Trust Cas. 204 (direction that a house be bricked up for twenty years.)

2. (1876) Weekly Notes 170, Ames Trust Cas. 201.

3. Pirbright v. Salway (1896) Weekly Notes 86, it was held that a trust for keeping up an inclosure in a burial ground was valid for

been held valid.[4]

The fact that there is no *cestui* capable of enforcing a private trust in not objectionable, provided the purpose of the trust is definite. A direction to apply the income of £750 for fifty years[5] towards the maintenance of the testator's horses and hounds if they should live so long[6] and a bequest of £300 upon trust to erect a monument to the first husband of the testator's wife[7] were both held valid tho it is obvious that there is no one to hold the trustee responsible for refusing to carry out the trust.[8]

Where, however, the object of the trust is indefinite, the trust is invalid, tho the trustee is willing to carry out the testator's wishes and the purpose is not illegal.

at least twenty one years from the testator's death. In *In re* Dean, *infra*, the court suggests the "limits fixed by the rule against perpetuities."

4. There is much confusion between the real rule against perpetuities (*supra*, note 1), and the so called rule against perpetuities which is really a rule forbidding the postponment of the vesting of contingent interests beyond a certain period—usually twenty one years after lives in being at the creation of the interest. Because of this confusion a trust would probably be held valid if it should be limited in duration to a period not longer than twenty one years after lives in being at the creation of the trust. For a discussion of this and related questions see 10 Mich. Law Rev. 31-41, Unenforcible Trusts and the Rule Against Perpetuities.

5. No objection was raised to the length of the period; conceivably the animals might have lived longer than twenty one years after lives in being at the death of the testator. See Gray, Rule Against Perpetuities § 906, 10 Mich. Law Rev. 40.

6. *In re* Dean (1889) 41 Ch. D. 552, Ames Trust Cas. 205.

7. Mussett v. Bingle, *supra*. See also Reichenback v. Quinn (1888) 21 Law Rep. Irish 138, Ames Trust Cas. 209 (bequest for masses); 11 Harv. Law Rev. 331. In Ross v. Duncan (1839) Freeman, Ch. 587, Ames Trust Cas. 212, a bequest of slaves to be set free in Liberia was held to be valid, tho unenforcible.

8. As will be pointed out later (see *post* § 286) the trustee could not profit by such refusal, but would be bound to account for the property to the next of kin of the testator. If the £750 had been directed to be spent for the benefit of a horse and hound hospital instead of for the testators' particular horses and hounds, it would have been a charity and enforcible by the State. See *ante* § 270.

In the leading case of Morice v. Bishop of Durham,[9] one A bequeathed her personal estate to the defendant upon trust to pay debts and legacies "and to dispose of the ultimate residue to such objects of benevolence and liberality as the Bishop of Durham shall most approve." The words, "benevolence and liberality" being broader than "charity" the gift could not be upheld as a charity. The Bishop was willing to carry out the terms of the will, but the court held the trust invalid[10] for indefiniteness and declared a resulting trust for the next of kin of the testator. The testator might have accomplished the result he desired by bequeathing the property to the next of kin, subject to a power of appointment in the Bishop of Durham among such objects of benevolence and liberality as he should most approve.

§ 272. The trustee—appointment and removal.

Apparently the creator of a trust may validly appoint any one a trustee; e. g. an infant,[1] a lunatic, a bankrupt[2] or an alien.[3] It was at one time thought that

9. (1805) 10 Ves. 521, Ames Trust Cas. 195.

10. The soundness of the decision and the validity of any distinction between this case and the cases of the monuments and animals and slaves (see *supra*, notes 3, 5) has been frequently attacked. See 5 Harv. Law Rev. 389-402, The Failure of the Tilden Trust, by Professor Ames; see also 9 *id.* 426, 11 *id.* 331. On the other hand, see 15 Harv. Law Rev. 509-530, Gifts for a Non-Charitable purpose, by Professor Gray, defending the decision.

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1. Jevons v. Bush (1685) 1 Vernon 342, Ames Trust Cas. 217. An infant trustee would not be liable for such breaches of trust as consist in mere failure to act—in analogy to the non-liability of an infant for breach of contract. But if the breach of trust consisted in wasting the trust property by positive acts of misconduct, it would seem that he would be liable therefor, in analogy to his common law liability for his torts.

2. Scott v. Carron Co. (1853) 18 Beav. 146. Tho the appointment of a lunatic or bankrupt would be valid, the court would probably remove him; see *post* § 273. That the creator of a trust may appoint as trustee a person whom the court would not itself appoint see *In re* Earl of Stamford (1896) 1 Ch. 288, 299.

3. The early rule was that an alien could take but not hold as trustee; King v. Boys (1569) Dyer 283b, Ames Trust Cas. 216 This

a corporation could not be a trustee for the same reason that it could not commit a crime, viz, that it had no conscience or soul, but it is well settled now to the contrary;[4] in fact, it is very common for a corporation to be a trustee.[5]

If for any reason a trusteeship should become vacant the duty usually devolves upon the court to appoint a new trustee.[6] In performing this duty the court will endeavor to appoint one who will be capable of managing the trust estate and who will likely be fair to all the *cestuis*. Hence a court, in the exercise of its discretion would never appoint a lunatic or infant as trustee and would not appoint a non-resident of the State,[7] a married woman,[8] an insolvent[9] or one of the *cestuis*[10] unless there should be exceptional circum-

disability was removed in England by St. 33 Vict. c. 14 § 2 and has not prevailed to any large extent in this country.

4. Att'y Gen'l v. Lauderfield (1743) 9 Mod. 286, Ames Trust Cas. 216.

5. It has the practical advantage over an individual in that its trusteeship is not interrupted by death.

6. Unless the creator of the trust makes some other provision for filling the vacancy.

7. In *In re* Hill (1874) Weekly Notes 228, the court appointed an alien as trustee of English property because the beneficiaries were also aliens.

8. In *In re* Campbell's Trust (1802) 21 Beav. 176, Ames Trust Cas. 220, the court's reluctance to appoint an unmarried woman was perhaps due to a fear that she might marry. That a *feme covert* is not incapable of being a trustee, see Still v. Ruby (1860) 35 Pa. 373, Ames Trust Cas. 219. One objection to appointing a married woman—that her husband must join in any conveyance of trust property—has been almost, if not entirely, removed by recent legislation; Claussen v. La Franz (1855) 1 Iowa 226.

9. In *In re* Barker's Trusts (1875) 1 Ch. D. 43, Ames Trust Cas. 223, the court removed a trustee because he had become a bankrupt and part of the property could easily be made way with; see *post* § 313.

10. In *Ex parte* Conybeare's Settlement (1853) 1 Weekly Rep. 458 such an appointment was made because all the persons interested favored it, and there were other trustees; see 25 Harv. Law. Rev. 482. In *Re* Hattat's Trusts (1870) 18 Weekly Rep. 416, Ames Trust Cas. 221, the husband of one of the *cestuis* was

stances favoring such an appointment. In England it seems objectionable to have a relative of any of the *cestui* appointed,[11] but such appointments are common in this country.

If the trustee is guilty of serious misconduct, or is for any reason incapable of performing the trust duties, it is, of course, desirable that he should be removed. In the absence of statute, the proper equity court will accomplish this removal by commanding the trustee to convey the trust property to a person designated by the court to be the new trustee. If, however, the trustee is an infant or lunatic,[12] a transfer by him, even if made under order of court, would be voidable. In such a case equity will not order a transfer but will issue an injunction against the trustee's further interfering with the trust property, and will appoint a conservator who will manage the trust property but will not, of course, have title. In England and in many States in this country, statutes have been passed[13] which enable a court of equity to vest the title in a new trustee without a transfer by the old trustee.[14]

§ 273. Same—disclaimer.

No one is under any obligation to accept the office of trustee. If a conveyance be made to T upon trust for C, the title passes as soon as the conveyance is made,[1] without waiting for the consent of T; but if T

appointed a trustee upon his undertaking to apply immediately to the court for the appointment of a new trustee in case of his becoming the sole trustee.

11. Wilding v. Bolder (1855) 21 Beav. 222, Ames Trust Cas. 221.

12. In Pegge v. Skynner (1784) 1 Cox, Eq. 23, Ames Trust Cas. 218 one of the defendants in a specific performance case was a paralytic; the order was that he should execute the conveyance when he should become capable.

13. Trustee Act of 1850, 12 & 13 Vict. c. 74, § 7; Rev. St. of Mo. (1909) §§ 11919, 11920.

14. Such legislation ought to cover specific performance cases as well.

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1. Doe v. Harris (1847) 16 M. & W. 517.

upon learning of the conveyance refuses to accept, such refusal or disclaimer relates back to the time of conveyance and operates to place the title back in the transferor or his representatives, just as if the conveyance had never been made.[2] If T once accepts, it is then too late to disclaim.[3]

Although a transferee by deed or will can thus rid himself of the legal title to property by disclaimer, the heir of the decedent creator of the trust can not thus escape; he is, however, entitled to his costs in being relieved, because not in fault.

Neither disclaimer by the trustee nor refusal to act after acceptance[4] will defeat the interest of the *cestui*. Equity will not allow a trust to fail for want of a trustee but will appoint some one who is willing to serve. The *cestui's* interest is likewise saved where the person or corporation is forbidden by law to take the legal title,[5] or where the person named dies be-

2. Adams v. Adams (1874) 21 Wall 185, Ames Trust Cas. 227. A similar rule applies to the equitable interest of C; it vests without his knowledge, subject to disclaimer. In Massachusetts and New York, however, a peculiar doctrine has grown up with reference to money deposited in a savings bank in trust for C; it requires that notice be given to C so that if the creator of what is therefore only a tentative trust dies without notifying C, the tentative trust ceases. Clark v. Clark (1871) 108 Mass. 522, Ames Trust Cas. 232; *In re* Totten (1904) 179 N. Y. 112, 71 N. E. 748; 4 Col. L. Rev. 502, 516; 7 *id.* 294, 11 *id.* 692; 13 Harv. Law Rev. 63; 18 *id.* 70. It has been suggested as an explanation that these decisions represent a reaction from the extreme liberality of *Ex parte* Pye. See *ante* § 267.

3. See Conyngham v. Conyngham (1750) 1 Ves. Sr. 522. As to whether a *cestui* may accept after disclaimer, see 26 Harv. L. Rev. 660.

4. Adams v. Adams *supra* (husband refused to act as trustee for wife after divorce).

5. Sonley v. Clock Makers Co. (1780) 1 Brown Ch. 81, Ames Trust Cas. 225.

fore the testator,[6] or where the conveyance is upon trust but no trustee has been named.[7]

D. NATURE OF CESTUI'S INTEREST.

§ 274. Remedies of cestui against trustee and vice versa.

If by the terms of the trust, or by the trustee's stating an account to the *cestui* the sole duty of the trustee is to pay over money, the *cestui* may[1] bring debt or indebitatus assumpsit.[2] Where the duty of the trustee is to do anything else, the *cestui* must proceed in equity in order to enforce it.[3] In Norton v. Ray[4] the *cestui* brought contract[5] against the trustee for the value of the trust property which the trustee had wrongfully conveyed to X; the court held that the *cestui* must proceed in equity. If it had been the duty of the trustee to sell and convey the property and hand over the proceeds to the *cestui*, then the latter would be able to maintain his common law action as soon as the trustee received the proceeds and became legally bound to pay them over.

If the trustee should execute an instrument under seal agreeing to carry out the trust, the *cestui* may, if he prefers, sue the trustee in the common law action of covenant.[6] If the promise to perform the trust is not

6. Attorney Gen'l v. Hickman (1732) W. Kelyng 34, Ames Trust Cas. 224.

7. Dodkin v. Brunt (1868) 6 Eq. 580, Ames Trust Cas. 226.

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1. But he need not proceed at law if he prefers to sue in equity.

2. See *ante* § 257. And see 6 Harv. L. Rev. 321.

3. This was largely due to the clumsiness of common law procedure and the inability of common law courts to issue commands to the defendant and enforce them; see *ante* § 5.

4. (1885) 139 Mass. 230, Ames Trust Cas. 239. See 10 Harv. L. Rev. 317, 5 Col. L. Rev. 479.

5. The statutory equivalent of indebitatus assumpsit.

6. Turner v. Wardle (1836) 7 Sim. 80. In Holland v. Holland (1869) 4 Ch. App. 449, Ames Trust Cas. 236 it was decided that the

under seal, special assumpsit would logically be allowed against the trustee wherever there was consideration for his undertaking the trust;[7] but the jurisdiction of equity over express trusts was so well settled before the action of special assumpsit came into general use that the latter action was practically never brought.[8]

Since the legal title is in the trustee and the *cestui's* interest is not recognized at common law,[9] the trustee may recover against the *cestui* in ejectment for trust land[10] or in trover or detinue for trust chattels.[11] The *cestui's* only remedy is to get a decree in equity forbidding the trustee to continue with his action at common law. In some jurisdictions, however, by statute, a *cestui* has been allowed to plead his equitable interest in common law courts[12] and a resort to equity is made unnecessary.

§ 275. Same—situs of trust property not important.

If a *cestui* wishes to sue his trustee it is not necessary that the court in which the suit is brought shall have jurisdiction of the trust property. It is enough that the trustee be subject to the jurisdiction of the court by being served with process or by entering a

mere fact that the trustee was a party to and executed the deed by which he was appointed trustee did not make the *cestui* a specialty creditor of the trustee's estate.

7. In such a case all the essentials of a contract are present.

8. In Megod's Case (1585) 4 Leonard 225, Ames Trust Cas. 235, the action was allowed. But see *contra*, Barnadiston v. Soame (1676) 6 How. St. Trials 1063, 1098.

9. With the exception noted *supra* note 2.

10. Weakly v. Rogers (1789) 5 East 138, note (a), Ames Trust Cas. 241. Similarly, the trustee may recover against the *cestui* in trespass *quare clausum;* Anonymous (1464) Year Book 4 Edward IV. folio 7, pl. 9, Ames Trust Cas. 240.

11. Gun v. Barrow (1850) 12 Ala. 743.

12. See 36 & 37 Vict. c. 66 § 24. And see cases collected, Ames Trust Cas. 242 note.

voluntary appearance.[1] Furthermore, not only may the *cestui* sue his trustee wherever he can get jurisdiction of him, he *must* do so there if at all; apart from statute, jurisdiction of the property alone is not enough. This frequently works a hardship on the *cestui*[2] and in some jurisdictions there has been legislation giving to the equity court of the situs of the property the power to confiscate in such cases the trustee's title and to vest it in a new trustee.[3] Such legislation is quite beneficial; but it should be broad enough in its terms to include other than trust cases.[4]

§ 276. Direct and indirect remedies of cestui against third persons—laches of trustee.

Where the trust property has been wrongfully interfered with by a third person so as to give rise to a common law action, it is the trustee and not the

1. This is true generally as to the enforcement of equitable rights. See *ante* § 9. In Earl of Kildare v. Eustace (1686) 1 Vern. 405, 416, Ames Trust Cas. 244, the defendant was trustee for the plaintiff of land in Ireland; the defendant being in England, the plaintiff sued him in an English court. It was held that the court had jurisdiction, since the decree of a court of equity was in the nature of a command to the defendant and only affected the trust property through the carrying out of such command.

2. For example, if X should fraudulently induce the trustee and refuses to perform his trust duties.

3. In Felch v. Hooper (1875) 119 Mass. 52, Ames Trust Cas. 246, the suit was for specific performance of a contract to sell land located in Massachusetts, the defendant vendor being a citizen of Maine. The court gave relief, holding that the case came within the provision of the Massachusetts statute "that when a person seised of an estate upon a trust express or implied, is out of the commonwealth, or not amenable to the process of any court therein having equity powers, this court shall have power to order a conveyance to be made thereof in order to carry into effect the object of the trust, and may appoint some suitable person in place of the trustee to convey the same in such manner as it may require."

4. This would avoid the necessity of such a strained construction as the court was compelled to make in Felch v. Hooper, *supra*. For the differences between a vendor and a trustee see *ante* § 264.

cestui who should bring the appropriate proceeding against the third person for such interference.[1] Similarly, if the wrong done to the trust property is of such a nature that the proper remedy against him is in equity, the proper person to bring the equity suit is the trustee.[2] But tho the *cestui* as such has no direct remedy against the third person, yet if he is in possession of the trust property, he may bring the proper remedy for a violation of such possession.[3]

Where the trust property consists of a chose in action, the trustee is the proper party to bring action to collect it. In Bailey v. New England Life Insurance Co.,[4] the defendant had agreed to pay to the insured, his executors, etc., "for the benefit of the widow, if any." The widow sued on the policy but the court gave judgment for the defendant because the action should have been brought by the executor.[5]

1. Lancaster v. Conn. Co. (1889) 92 Mo. 460, 5 S. W. 23 (injury to land); Chambers v. Mauldin (1842) 4 Ala. 477 (detinue for slaves); McRaeny v. Johnson (1849) 2 Fla. 520 (trespass for beating slave); Lincoln v. French (1881) 105 U. S. 614 (*cestui* fails in ejectment because of the outstanding title in the trustee). In Doe v. Pegge (1785) 1 Term Rep. 758 note (a), Ames Trust Cas. 252, Lord Mansfield gave relief to a plaintiff in an ejectment action tho the legal title was outstanding in a trustee; the judgment was necessarily conditional like an equity decree. The decision was no doubt influenced by Lord Mansfield's training in the civil law of Scotland where the same courts administered both law and equity. His decision was soon afterward overruled; see Ames Trust Cas. 255 note.

2. For example, if X should fraudulently induce the trustee to convey trust land to him, the trustee would be the proper party to bring a bill for a reconveyance.

3. Cox v. Walker (1847) 26 Me. 504 (trespass to land); Howard v. Snelling (1859) 28 Ga. 469 (trover for chattels). See Ames Trust Cas. 251 note; 19 Harv. Law Rev. 307.

4. (1873) 114 Mass. 177, Ames Trust Cas. 256.

5. If the promise had been to pay *to* the widow, the latter would not have been a *cestui que trust* but the beneficiary of a contract and entitled in most jurisdictions to recover in special assumpsit. See *ante* § 258.

Since the trustee is the proper party to sue for wrongs to the trust property and for the collection of other claims due to the trust estate, it is obviously his duty to do so. If he should refuse to perform this duty it is a breach of trust and the *cestui's* remedy is to sue the trustee therefor and get a decree from a court of equity, commanding him to bring the appropriate action at law or suit in equity. If the third person is without the jurisdiction of the court where the *cestui* brings his bill against the trustee, the *cestui* may have the third person joined with the trustee as a co-defendant and have both suits settled in one. The *cestui* cannot, however, sue the third person without joining the trustee, unless there is a good excuse for not joining him—for example, being beyond the jurisdiction of the court.[6]

On the other hand, where the trustee is properly performing his duties by bringing the action against the third person, it is not necessary that the *cestui* be made a party plaintiff.[7] And if the trustee is barred by delay in bringing the suit, the *cestui* is also barred. In Wych v. East India Co.,[8] X had a claim against the defend-

6. See Morgan v. Kansas City Ry. Co. (1882) 15 Fed. Rep. 55, Ames Trust Cas. 258: "Lewis, being the trustee. . . . is the proper party plaintiff in a suit of this character, and some good reason must appear of record why he does not sue as plaintiff; and in such case he must be made defendant. . . . The averment as to the request to Lewis to bring suit . . . is not proved on the part of the plaintiff. It would be necessary to prove it even though Lewis were served with process or appeared. It is not alleged in the bill that he is beyond the jurisdiction of the court nor is that fact proved." See also Anon. (1387) Bellewe's Cases 11, Ames Trust Cas. 264. There are a few bank collection cases where a depositor—who was in the position of a *cestui*—was allowed to recover directly against the so called sub-agent collecting bank; First Nat'l Bank v. First Nat'l Bank (1881) 76 Ind. 561. The explanation may lie in the fact that they are not recognized as trust cases. See *ante* § 256.

7. Carey v. Brown (1875) 92 U. S. 171, Ames Trust Cas. 260 (action on note.)

8. (1734) 3 P. Wms. 309, Ames Trust Cas. 271.

ant and died leaving as his heir the plaintiff who was an infant of tender years. A was appointed administrator and as such was substantially in the position of a trustee for the plaintiff.[9] A failed to bring suit on the claim before the Statute of Limitations had run. The plaintiff within a short time after reaching majority brought suit; but it was held that since the trustee was barred the plaintiff was also barred[10] and could not take advantage of the exception in the Statute of Limitations in respect to suits brought by obligees after reaching majority.[11]

§ 277. Same—remedy of trustee against a confederate.

In Wetmore v. Porter[1] the plaintiff trustee in breach of his trust conveyed the trust property to the defendant, both intending to defraud the *cestui*. To a suit brought by the trustee to get back the trust property the defense set up was that the trustee himself was a wrongdoer and hence was not entitled to maintain the suit. The court refused to sustain the defense holding that the trustee was "entitled to his *locus penitentiae* and an opportunity to repair the wrong which he may have committed."[2]

This right of the trustee to repent and get back the trust property would be lost if before bringing

9. See *ante* § 263.

10. Conversely, if the trustee is an infant, he may take advantage of the exception in the Statute of Limitations for the benefit of a trustee even tho the latter is *sui juris;* Clayton v. Rose (1882) 87 N. C. 106. But see *post* § 280.

11. The rule is apparently not applied where the defense is estoppel instead of delay; Volmann v. Michel (1905) 96 N. Y. Supp. 309. See 19 Harv. Law Rev. 545, approving this on the ground that estoppel is in its nature equitable and hence should not defeat the *cestui's* prior equity. But see 21 Harv. Law Rev. 52, 64, criticising Capell v. Winter (1907) 2 Ch. 376.

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1. (1883) 92 N. Y. 76, Ames Trust Cas. 263.

2. Obviously the trustee has no right to get back the property except for the benefit of the *cestui;* if the *cestui* is willing to allow the trustee to act for him, the confederate can hardly object.

suit against his confederate the *cestui* should sue the trustee for the breach of trust or should himself sue the confederate to have a constructive trust declared of the property.[3] And this independent right of the *cestui* to proceed directly should not be prejudiced in any way by the fact that the trustee may repent and sue. For example, if the trustee has waited so long before suing that he is barred, it ought not to operate as a bar to the *cestui's* suit.[4] The rights of the confederate can rise no higher than those of the trustee and the Statute of Limitations should not begin to run against the *cestui* till he has knowledge of the breach of trust.[5]

§ 278. Same—discharge of obligor by trustee and cestui—payments to trustee by obligor.

Since the trustee is the proper party to sue for claims due to the trust estate it follows that he alone can give to the obligor a release which will be valid and effectual at common law.[1] If such a release is given in fraud of the *cestui's* rights, the latter is entitled to enjoin the obligor against taking advantage[2] of it, unless the obligor is a *bona fide* purchaser for value without notice.[3]

3. See *post* § 301-305. The *cestui* does not need here to sue through the trustee because whatever rights the confederate has have been derived from the trustee.

4. See 11 Col. Law Rev. 686, approving of such a decision in Elliott v. Landis Machine Co. (1911) 236 Mo. 546, 139 S. W. 356 and 12 Harv. L. Rev. 132 criticising a decision *contra* in Willson v. Louisville Trust Co. (1898) 102 Ky. 522, 44 S. W. 121.

5. See *ante* § 263; and also see 9 Col. L. Rev. 89.

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1. Gibson v. Winter (1833) 2 L. J. [N. S.] 130, Ames Trust Cas. 267, (release by trustee good answer to an action at law brought by the *cestui* in the name of the trustee). See also Parker v. Tenant (1561) Jenkins, Century Cas. 221, *pl.* 75, Ames Trust Cas. 266 (marriage of the obligor and *cestui* was held not to discharge the bond, tho it would have operated as a discharge if the *cestui* had been the obligee in the bond).

2. See Gibson v. Winter, *supra;* 11 Harv. L. Rev. 479.

3. See *post* § 301.

A release by the *cestui*, tho no bar at common law, will be effectual in equity if the *cestui* was *sui juris*. In jurisdictions where law and equity are administered in separate courts[4] the obligor will take advantage of such a release by getting an injunction against the trustee's bringing or further pressing his common law action on the claim. Such an injunction is given in order to avoid circuity of action; that is, if the trustee were allowed to recover against the obligor, it would be the former's duty to pay the amount of recovery over to the *cestui;* the latter having released the obligor would be bound to refund to him the amount so received; as a consequence the parties would be in substantially the same position as when they started. In order to avoid this useless circuity equity enjoins the first suit.[5]

As already pointed out,[6] it is safe for an obligor to pay a trustee unless he knows or has reason to suspect that the trustee is about to commit a breach of trust.[7] There was formerly an exception to this rule which required that a purchaser of trust property from a trustee with power to sell should see that the purchase money was properly applied by the trustee for

4. In other jurisdictions the defense is in the nature of an equitable plea at law.

5. A difficult question arises where T, the trustee of a non-negotiable claim against O assigns the claim to A who takes without notice of the trust and O then pays C the *cestui*, neither knowing of the assignment. If there were no trust involved a payment to the assignor without notice of the assignment would be good against the assignee, so that if O had paid T it would have been a good defense. On the other hand, if there had been no assignment involved, a payment by O to C would be a good equitable defense. In the case supposed, should A be allowed to compel O to pay again? Seymour v. Smith (1889) 114 N. Y. 481, 21 N. E. 1042 (assignment of a judgment by T) held that O must pay but the opinion is unsatisfactory in that it assumes that A got legal title to the judgment. Of course, if legal title passed A's legal right should prevail over O's merely equitable defense.

6. See *ante* § 261.

7. American Nat. B'k. v. Fidelity etc. Co. (1907) 129 Ga. 126,

the benefit of the *cestui*.[8] This proved so inconvenient in practice that it has apparently been changed everywhere by statute or decision.

§ 279. Remedies of third person against trustee and cestui—set-off.

Suits, whether at law or in equity, brought by a third person with respect to the trust property are properly brought against the trustee alone.[1] For example, unless the taxing statutes provide otherwise, the trustee and not the *cestui* is personally liable for the taxes on the trust property; and in case of personal property,[2] it is usually taxable at the domicile of the trustee, not of the *cestui*,[3] and the trustee is also liable for the damage caused to a third person by a nuisance on trust land.[4] In entering into contracts with third persons in the performance of his duties as trustee he may by express stipulation, however, limit his liability to the amount of trust funds in his hands.[5] The right of the trustee to indemnity and exoneration against the trust estate will be discussed later.[6]

At the early common law if A sued B on one cause of action and B had another cause of action against A,

58 S. E 867 (bank paid out trust funds to the trustee knowing that the trustee was committing a breach of trust by improper withdrawal of the funds). See 8 Col. Law Rev. 54 and 10 *id.* 162.

8. Lewin, Trusts, 9th ed. 502.

1. Kerrison v. Stewart (1876) 93 U. S. 155, Ames Trust Cas. 261 note. Where the suit is to foreclose a mortgage on the trust property some cases have held that the *cestui* should be made a co-defendant in order that he shall be given every opportunity to protect his interests and prevent a foreclosure; Mavrich v. Grier (1867) 3 Nev. 52.

2. Latrobe v. Baltimore (1862) 19 Md. 13, Ames Trust Cas. 278.

3. See 6 Col. Law Rev. 127; Perry, Trusts § 331.

4. Schwab v. Cleveland (1882) 28 Hun 458, Ames Trust Cas. 280. See 11 Harv. Law Rev. 420.

5. Shoe and Leather National Bk. v. Dix (1877) 123 Mass. 148, 25 Harv. Law Rev. 482.

6. See *post* § 315.

B could not use this in any way as a defense but was compelled to bring a separate suit. In order to remedy this inconvenience statutes have been passed in most, if not all, jurisdictions, allowing B in such a case to set off his claim against A's claim[7] and thus settle both cases in the one litigation. Where a trustee of a cause of action sues thereon the obligor may set off against it a claim which he has against the trustee, because set-off statutes have been construed to apply to parties to the record and not to the real parties in interest who are ultimately to be benefitted.[8] Equity, however, protects the interest of the *cestui* by giving the *cestui* an injunction against the obligor's relying on such a set-off unless at the time that he became bound to the trustee he was ignorant of the trust.[9] If the obligor's claim had been one against the *cestui* instead of against the trustee, he could not have set-off at common law because the *cestui* is not a party to the record.[10] But in equity the obligor is usually allowed to take advantage of such a claim, by what is known as equitable set off.[11]

7. There has been a tendency in set off statutes to limit their operation to claims for liquidated amounts. But in the meantime the common law courts without statute have allowed the defendant to counterclaim for an unliquidated amount arising out of the same transaction as the original claim, or to use such a claim by way of recoupment of damages in order to reduce the amount of the plaintiff's recovery.

8. Forster v. Wilson (1843) 12 M. & W. 191, 203.

9. Nat'l Bk. v. Ins. Co. (1881) 104 U. S. 54. Compare the doctrine of *bona fide* purchaser for value without notice, *post* § 301.

10. Wake v. Tinkler (1812) 16 East 36.

11. Wright v. Cobleigh (1851) 23 N. H. 32. *Quaere* as to whether an obligor, who did not know of the trust at the time he became bound to the trustee, may have equitable set off again the *cestui* in addition to having set off against the trustee. The set off statutes above referred to are merely the procedural statutes which were passed to limit the number of actions and not the set off statutes dealing with insolvency or bankruptcy of the parties; Forster v. Wilson, *supra*.

§ 280. Is the cestui's substantive right in personam or in rem?

It is clear that from the standpoint of procedure the right of the *cestui* is that of a claimant against the trustee. It is not, however, a mere right *in personam,* such as the right of an ordinary creditor against his debtor but a right *in personam ad rem; i.* e., a right to compel the trustee to account for specific property and to hold it for the *cestui's* benefit. Since substantive rights are derived from procedural rights, it has been the orthodox view to regard the *cestui's* substantive right as also *in personam*—a confidence imposed in the trustee and not an interest in the trust property.[1] Within the last century—partly due to the extensive merging of law and equity procedure—there has grown up a tendency to regard the *cestui* as having an interest in the property itself good against everyone but a *bona fide* purchaser of the legal title.[2] The square adoption of this view rather than the other would lead to a different result in three classes of cases: (1) A *cestui* would not be bound by the laches of his trustee in failing to collect a chose in action belonging to the trust estate.[3] (2) A *cestui* would be protected against a *bona fide* purchaser for value of the *cestui's* equitable

1. See 18 Harv. Law Rev. 53.

2. See 28 Harv. Law. Rev. 507; Willoughby, The Legal Estate, chapter 1, reviewed by Professor Pound in 26 Harv. Law Rev. 463; Huston, the Enforcement of Decrees in Equity, 87-154. According to this view the trustee is treated as an agent with the power to cut off the right of the *cestui que trust* by a transfer to a *bona* fide purchaser for value without notice. The analogies usually cited are the sale of chattels in England in market overt and the cutting off of an unregistered legal title by a conveyance and registry under the American registry system.

3. See *ante* § 276; 28 Harv. Law Rev. 510, note 24. Similarly, a disseisor in whose favor the Statute of Limitations has run against a trustee might, on the *in rem* theory, still be liable to a *cestui* who is not yet barred by the statute because of a disability, like infancy. See *post* § 309.

interest.[4] (3) In case of successive assignments by a *cestui* the first assignee would be protected regardless of notice.[5]

E. Resulting and Constructive Trusts.

§ 281. Distinction between resulting and constructive trusts.

The distinction between resulting and constructive trusts[1] is frequently not of great practical importance.[2] But there are at least two differences worth noting. Since a constructive trust is imposed without regard to the intentions of the parties, as a specific remedy for a wrong done or threatened, it is obvious that no statute of frauds or registry act would ever be construed as applying to them because they are in their nature incapable of having a written memorandum of their creation or of being recorded.[3] On the other hand, resulting trusts—especially those which are based upon the actual and not merely upon the presumed intent of the parties—might reasonably be required by statute to have a memorandum or to be recorded.[4]

Another point of difference arises in the field of conflict of laws. Whether a resulting trust arises in a particular case depends properly upon the law of the

4. See *post* § 304. See also Brown v. Fletcher (1914) 235 U. S. (interest of *cestui* not a chose in action within the meaning of a statute fixing jurisdiction. "The beneficiary here had an interest in and to the property that was more than a bare right and much more than a chose in action.")

5. See *post* § 306.

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1. For a logical classification of trusts according to substance, see *ante* § 250.

2. This is probably the reason for the loose and indefinite use of the terms.

3. See 12 Harv. Law Rev. 64 criticising Robertson v. Rentz (1898) 71 Minn. 489, 74 N. W. 138.

4. See 7 Harv. Law Rev. 379 discussing Gunnison v. Erie Dime Savings Bank (1893) 157 Pa. 303, 27 Atl. 747.

jurisdiction where the property is situated, regardless of where the parties live or where the transaction took place or where the suit was brought.[5] On the other hand, whether a constructive trust will be declared will depend entirely upon the place where the remedy is sought[6]—that is, where suit is brought—and nothing will turn upon the location of the property.

I. Purchase money resulting trusts.

§ 282. Origin of the rule.

During the century prior to the passing of the Statute of Uses, most of the land in England was held in use.[1] It was natural, therefore, for a purchaser of land to have the title conveyed to some one to hold for the use of the purchaser; and so general was this

5. In Acker v. Priest (1894) 92 Iowa 610, 61 N. W. 235, A had conveyed Kansas land to his son-in-law, X, at the request of X's wife, Y; X later sold the land and invested the proceeds in Iowa land. The law of Kansas did not recognize the doctrine of resulting trusts, while the law of Iowa did. It was held that since the trust must have arisen, if at all, with respect to the Kansas land, the Kansas law governed and hence there was no resulting trust to Y, tho suit was brought in Iowa. See 17 Harv. L. Rev. 123, 570.

6. Where a court of State A declares a constructive trust of land in State B in a case where by the law of State B no such constructive trust would be imposed, no interest in the foreign land will arise till the transfer is made according to the decree. In Lord Cranstown v. Johnston (1796) 3 Ves. 170 the defendant committed a tort on the plaintiff by having the plaintiff's land in the island of St. Christopher sold without notice to the plaintiff, the defendant bidding it in at the sale. The English court having jurisdiction of the defendant decreed that the defendant should hold the land as constructive trustee for the plaintiff, according to the remedy given by English law. Title having passed by the law of St. Christopher not subject to an equity, the plaintiff will get no interest in the land till the defendant conveys to him in accordance with the command of the English court. See 20 Harv. Law Rev. 334.

1. See *ante* § 246.

practice that even if the use were not expressed at the time of the conveyance, there was a presumption that such a conveyance was for the use of the one who furnished the purchase money. When the Statute of Uses was passed, it executed these uses[2] and thus destroyed them as interests separated from the legal title.[3] Later, when the modern passive trust arose,[4] the same presumption was applied[5] to passive trusts which had been applied to uses, though in the meantime the conveyancing customs had changed and it was not the usual thing for land to be held in trust; hence the only argument for the modern presumption is that a purchaser is more likely to intend the stranger to hold in trust for him than he is to make the stranger a gift.[6]

§ 283. Extent and limitations of the rule.

In order that a resulting trust may arise, the purchase money must be furnished not later than the time of the conveyance;[1] if it is furnished later, the rule as to express trusts applies and there must not only be affirmative proof of intent to create a trust but if the property is land[2] there must be a memorandum in writing to satisfy the Statute of Frauds. This requirement is satisfied if the person seeking to have the trust declared binds himself to pay the purchase money; the

2. See *ante* § 247.

3. Tiffany, Real Property § 88.

4. See *ante* § 248.

5. Where the conveyance was taken in the name of a stranger —i. e. a person not dependent upon the purchaser.

6. Whether this is a sufficiently strong probability upon which to base a presumption, *quaere*. See *post* § 286.

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1. Jacksonville Nat'l B'k v. Beesley (1895) 159 Ill. 120, 42 N. E. 164 (arrangement whereby the plaintiff was to become part owner of land bought by the defendant if she could dispose of her land).

2. The rule as to purchase money resulting trusts applies to personal property also; Briggs v. Sanford (1914) 219 Mass. 572, 107 N. E. 436.

later payment of the purchase money which he is obligated to pay is not a later furnishing of the purchase money.[3] Hence if A borrows from B the money wherewith to buy the land and has the land conveyed to B, there is a presumption of a resulting trust of the equity of redemption, B being entitled to hold the land merely as security for the repayment of the loan.[4]

It is well settled that if A furnishes an aliquot share of the purchase money—such as one half, one third, etc.—and title is taken in the name of B who furnishes the rest, there is the presumption of a resulting trust as to a proportional undivided interest in the property. There has been an odd tendency, however, to limit the application of the rule to cases where an aliquot share[5] has been furnished.[6] The better view is that the rule should apply where any definite fractional part has been furnished.[7]

Since a purchase money resulting trust is one that "results from the fact that one man's money has been

3. See 1 Harv. Law Rev. 185-190, Subsequent Payments under Resulting Trusts, by C. E. Grinnell.

4. McDonough v. O'Niel (1873) 113 Mass. 92. While the burden of proving that no trust was intended is upon the grantee, the latter does not have the burden of showing that the plaintiff did not really furnish the purchase money; Phillips v. Phillips (1913) 81 N. J. Eq. 459, 86 Atl. 949 (grantee introduced evidence to show that the money was loaned to her to buy for herself.)

5. In McGowan v. McGowan (1859) 14 Gray 119 the court said it should be either an aliquot share "or for a particular interest, as a life estate, or tenancy for years or remainder, in the whole." The court does not explain what fractional part would be necessary to be paid for the various interests named. It would seem that such a result could only be reached by an express arrangement and that the law of resulting trusts is inapplicable.

6. In Skehill v. Abbott (1903) 184 Mass. 145, 68 N. E. 37 the rule laid down in McGowan v. McGowan *supra*, was relaxed so as to declare a resulting trust of two-fifths.

7. Currence v. Ward (1897) 43 W. Va. 367, 27 S. E. 329. In Becker v. Vining (1849) 30 Me. 121, 127, where the shares were undefined the court refused to declare a resulting trust, but in Enwards v. Edwards (1861) 39 Pa. St. 369 the court presumed the shares to be equal. See 18 Harv. Law Rev. 573.

invested in land and the title taken in the name of another" it is not necessary that the grantee have any knowledge of the transaction;[8] and not only is it therefore unnecessary that there be any promise on his part to hold in trust,[9] but evidence of an oral promise by him would seem to be admissible only if an attempt were made to show that a gift was intended, and then only to show intent and not for the purpose of enforcing the promise. The fact that the grantee did make such an oral promise should not prevent the trust from arising.[10]

If A buys land and has the conveyance made to B in order to defraud A's creditors, A is prevented by the fraud from taking advantage of any resulting trust.[11] This does not, however, bar the creditors of A from having a resulting trust declared for themselves to the extent of their claims against A.[12]

§ 284. Rebutting the presumption—conveyance to a dependent.

Where the conveyance is taken in the name of one not dependent, the presumption of a resulting trust

8. Froemke v. Marks (1913) 259 Ill. 146, 102 N. E. 192. If the grantee disclaims, the title will revert to the grantor subject to the resulting trust in favor of the purchaser.

9. See 10 Harv. Law Rev. 192 criticising Nashville Trust Co. v. Lansom's Heirs (1896) 36 S. W. 977 (Tenn. Ch. App.).

10. Long v. Mechem (1904) 142 Ala. 405, 38 So. 262.

11. Demaree v. Driskell (1832) 3 Blackf. 115. In Miller v. Davis (1872) 50 Mo. 572, X had entered forty acres of public land in the name of his infant son because he was not entitled to enter the tract in his own name. The court held that no trust resulted because the entry was against public policy. Apparently the son may keep unless the United States should proceed to avoid the entry.

12. Demaree v. Driskell *supra*. And see 18 Harv. Law Rev. 547 criticising Monahan v. Monahan (1904) 77 Vt. 133, 59 Atl. 169. See also 5 Col. L. Rev. 317 and 473; 9 Ill. Law Rev. 199-201. In Perkins v. Nichols (1866) 11 Allen 542 a resulting trust was declared for the purchaser because in the meantime his debts had been paid.

may be rebutted by showing that a gift was intended.[1] Where the conveyance is taken in the name of a dependent—such as a wife[2] or a child[3]—there is not only no presumption of a resulting trust but a contrary presumption[4] of a gift or advancement. This presumption, however, may likewise be rebutted by showing that a trust and not a gift was intended[5]—the burden of proof here being on the purchaser and not upon the grantee.[6]

§ 285. Legislative changes.

If the Statute of Frauds had been scientifically drawn and liberally construed it would have applied to all actually intended trusts and therefore to purchase

1. Bibb v. Smith (1874) 2 Hask. 728. Or that the conveyance was in performance of a contract. Livermore v. Aldrich (1850) 5 Cush. 431.

2. Lochenour v. Lochenour (1878) 61 Ind. 595. The presumption persists in spite of a decree of divorce or annulment; 23 Harv. L. Rev. 232, discussing Dunbar v. Dunbar (1909) 25 T. L. R. 21. Since a wife is not under obligation to support her husband, there is no presumption of a gift to him; Martin v. Remington (1898) 100 Wisc. 540, 76 N. W. 614; 27 Harv. L. Rev. 292.

3. Cartwright v. Wise (1853) 14 Ill. 417 (idiot son); Stock v. McAvoy (1872) 15 Eq. 55.

4. It is nearly always thus stated. But since without any presumption either way the purchaser—as plaintiff—would ordinarily have the burden of making good his contention that a trust was intended, the so called presumption is usually unnecessary.

5. Rankin v. Harper (1856) 23 Mo. 579 (conveyance to infant son; presumption rebutted by showing that the conveyance was made to defraud creditors). See also Persons v. Persons (1874) 25 N. J. Eq. 461. In *In re* Davis (1901) 112 Fed. 120 the presumption of a gift to a daughter grantee was rebutted by showing that the daughter's children were meant to have the beneficial interest. In Coholan v. Condrin (1914) 1 Ir. R. 89 it was held that the presumption of a gift of a bank deposit to a wife was not rebutted by the mere fact that the name of the husband's brother was also on the deposit receipt. See 12 Col. Law Rev. 567 criticising Mullong v. Schneider (1912) 155 Ia. 12, 134 N. W. 957 for refusing to give any effect to an oral undertaking of a wife to hold in trust.

6. The distinction taken here between conveyances to those dependent and those not dependent is somewhat analogous to the rule which allowed a use to be created gratuitously in favor of a

money[1] resulting trusts.[2] The English statute expressly excepted all trusts which might "arise or result by the implication or construction of law" and this was construed as excepting not only constructive but also all resulting trusts.[3] This construction, however, is not as objectionable as the presumption which shifts the burden from the purchaser to whom it would ordinarily belong, to the holder of the legal title to show that no trust was intended. The presumption is difficult to justify either on the score of probability[4] or convenience, and should be abolished by statute.[5] Some jurisdictions have not only abolished the presumption but the trusts themselves, except in favor of the purchaser's creditors.[6] This is highly unjust to the purchaser because it allows the grantee upon an oral trust to enrich himself at the former's expense.[7]

near relative but required consideration in case of creating a use in favor of a stranger. See *ante* § 266.

1. It is difficult to imagine a case where the purchaser would not have an actual intent in regard to the transaction—either that it should be a gift, or upon trust or in performance of a contractual obligation to the grantee.

2. This does not mean, however, that the purchaser would or should have been without remedy in case a trust were intended; in such a case if the grantee refused to carry out the intended trust, equity would, by the better view, have imposed a constructive obligation in order to prevent the grantee from enriching himself at the purchaser's expense. See *post* § 291. And see 20 Harv. L. Rev. 557.

3. That is, both those which are based upon presumed intent and those based upon actual intent; see *ante* § 250.

4. While it might be more likely that a trust was intended than a gift, it does not seem that the balance is overwhelming.

5. This seems to have been done in Indiana; Glidewell v. Spaugh (1866) 26 Ind. 319; 2 Burns Ann. Ind. Stat. (1914) §§ 4017-9; and in Kansas; Franklin v. Colley (1872) 10 Kan. 260; Gen. Stat. Kan. (1909) §§ 9699-9701.

6. See Winans v. Winans (1894) 99 Mich. 74; 4 Howells' Mich. Stats. (1911) §§ 10675-7; Ryan v. Williams (1904) 92 Minn. 506; Gen. Stats. Minn. (1913) §§ 6706-8; 20 Harv. L. Rev. 556.

7. See 20 Harv. L. Rev. 555-557.

II. Intended trust fails—property not exhausted by the trust.

§ 286. Failure because of lapse, illegality or uncertainty.

If A devises or bequeaths property to T upon trust for C and C dies before A, there is a lapse of C's equitable[1] interest, and there is a resulting trust for the heirs or next of kin of A.[2] Where a gratuitous conveyance is made upon trust for a purpose which—tho not immoral[3]—has been declared by decision or statute to be illegal, there is a resulting trust to the grantor or to his heirs or next of kin.[4] And where property is conveyed gratuitously upon trust but no purpose is mentioned[5] or the purpose mentioned is too indefinite[6] to be accorded legal recognition, there is, similarly, a resulting trust to the grantor or his representatives.

1. Equity follows the law here. If the legal title had also been devised or bequeathed to C and C had died before A there would have been a lapse because the will does not take effect till the death of A.

2. Digby v. Legard (1774) 3 Peere Wms. 22, Note (1); Hartopp's Case (1591) Croke, Eliz. 243. If A has no heirs or next of kin the beneficial interest goes to the State. See *post* § 308.

3. If the purpose were immoral—e. g. to defraud creditors—this would prevent the grantor from availing himself of the resulting trust unless he acts promptly in repudiation of the fraud; *In re* Great Boston Steamboat Co. (1884) 26 Ch. D. 616. See *ante* § 30. But it would not so prevent his creditors. See *ante* § 283.

4. Carrick v. Errington (1726) 2 Peere Wms. 361 (conveyance of land to a Roman Catholic who at that time was disabled by statute from holding any interest in land). Tregonwell v. Sydenham (1814) 3 Dow 194 (devise on trust void for remoteness). In *In re* Franklin's Estate (1892) 150 Pa. 437, 24 Atl. 626 the court seemed to hold that where the conveyance was made to a municipal corporation, the latter would not be subject to a resulting trust. See criticism in 6 Harv. L. Rev. 202.

5. Penfold v. Bouch (1844) 4 Hare 271; Welford v. Stokor (1867) Weekly Notes 208.

6. Salusbury v. Denton (1857) 3 Kay & J. 529; and see *ante* § 271.

These resulting trusts are imposed upon the theory that if the grantor or devisor had thought about the possibility of the failure of the intended trust, he would have preferred that the beneficial interest should vest in himself or his representatives rather than in the trustee. Such a presumption seems justified both on the score of probability and fairness. In the logical classification of trusts already given[7] these trusts would therefore fall under class (3).

§ 287. Property not exhausted by intended trust.

Another illustration of resulting trusts which fall under class (3) is found[1] where property is conveyed upon a trust which fails to exhaust the entire property transferred to the trustee; in such a case there is a resulting trust as to the residue for the grantor or his representatives,[2] there being nothing to show that the trustee was meant to have any beneficial interest.[3] But if the transfer of property to T be made "subject to" a trust in favor of C, and the intended trust does not exhaust the whole property, T is entitled to keep the residue for himself. In Clarke v. Hilton[4] the court said: "If the property is given to J. C. Hilton sub-

7. See *ante* § 250.

1. See *ante* § 250.

2. Ellcock v. Mapp (1851) 2 H. of L. 492; *In re* West (1900) 1 Ch. 84. In such a case the grantor usually has no real intent in the matter, so the basis of the trust is his presumed intent. See *ante* § 286. In *In re* British Red Cross Balkan Fund (1914) 2 Ch. 419 there was a large unexpended balance of a war fund which had been raised by subscription; this balance was held to belong to the subscribers ratably in proportion to their subscriptions; see 14 Harv. L. Rev. 235; 28 *id.* 193, 216.

3. If the circumstances show that the transferor must have meant the transferee to take the residue beneficially, the presumption of a resulting trust will be rebutted; Rogers v. Rogers (1733) 3 Peere Wms. 193 (widow transferee would otherwise be unprovided for). See also Gladding v. Yapp (1820) 5 Madd. 56.

4. (1886) L. R. 2 Eq. 810.

ject to trusts specified, it cannot be held subject to any other trust; and if after satisfying the trusts specified there remains a surplus, there is nothing in the language of the gift or in the context to create a resulting trust in favor of the next kin."

§ 288. Where transferror received pay for the property.

In the cases discussed in the two preceding sections it has been assumed, if not expressed, that the conveyances were made gratuitously. If in any of the cases the transferror was paid for the property, there would obviously be no resulting trust because he could not keep the purchase price and also get his property back. The consequence is that ordinarily the transferee may keep,[1] because there is no one entitled to take it away from him.[2]

III. Gratuitous conveyance upon oral trust.

§ 289. Gratitous conveyance inter vivos—whether resulting trust.

It was the general custom, during the century before the Statute of Uses, to have land held in use.[1]

1. In Van der Volgen v. Yates (1853) 5 Selden 219 the purchase money had been paid by the transferees; the trust ultimately failed for indefiniteness; the court refused to declare a resulting trust to the grantor's heir because "the grantor cannot have the purchase money and the land also."

2. In Cunnack v. Edwards (1896) 2 Ch. App. 679 a number of persons had formed an association for the purpose of protecting their widows. All the members died, leaving an unexpended residue of the common fund. The lower court held that there was a resulting trust to the personal representatives of the contributors to the fund, but this was reversed on the ground that it was a business arrangement and therefore the contributors had been paid for their contributions. Since the trustee (the association) had also gone out of existence, without next of kin, the funds were held to belong to the Crown as *bona vacantia;* see *post* § 308.

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1. See *ante* § 282.

Consequently, if A made a gratuitous conveyance without declaring any use, it was presumed that he did not mean to make a gift but that he meant merely to convey the legal title and to retain the beneficial interest; i. e. a use was presumed to result to the grantor.[2] After the enactment of the Statute of Uses which passed the legal title to the person who before the statute would have held merely the use, such conveyances would usually be made utterly useless[3] and ineffectual and hence were no longer made.[4] After the modern passive trust was recognized in spite of the Statute of Uses,[5] the question was raised as to whether there was a presumption of a resulting trust in case of a gratuitous conveyance where no use was declared;[6] it was held not only that the old presumption did not apply[7] but that no resulting trust could be recognized.[8]

§ 290. Same—whether constructive trust.

Altho in the case just discussed the courts will not recognize a resulting trust and cannot, of course, give effect to the oral trust because of the Statute of Frauds, it seems fairly obvious that the transferee should not

2. Van der Volgen v. Yates (1853) 5 Selden 219; 27 Harv. Law Rev. 440. The presumption could be rebutted by showing an intent to make a gift. See Leake Digest, 2nd ed. 83.

3. Because the legal title would at once revest in the grantor. Shortridge v. Lamplugh (1702) 2 Lord Raymond 798: "Now if a feoffment or release should not be intended to be to the use of the feoffee or releasee, they would be vain and to no purpose."

4. Where the conveyance was by bargain and sale or covenant to stand seised there could be no resulting trust because "a consideration moving from the grantee necessarily exists or is implied." Tiffany, Real Property § 89.

5. See *ante* § 248.

6. So, if the deed declares the use in the grantee, it prevents the grantor from showing a resulting trust; Jackson v. Cleveland (1866) 15 Mich. 94.

7. See 27 Harv. Law Rev. 441.

8. Conceivably the courts might have rejected the old presumption as not in accord with the then method of holding land—and therefore not based upon probability—and at the same time al-

be allowed to keep the land thus conveyed to him.[1] This represents the rule in England, the English courts taking the position that "it is not honest to keep the land;"[2] they therefore impose a constructive trust as a specific remedy for wrongful and dishonest retention of the land. In this country the weight of authority is that the transferror is not entitled to this remedy in the absence of fraud and that the mere refusal to perform the oral trust is not fraud.[3] The apparent eagerness and astuteness of the courts in such cases in finding

lowed the actually intended trust to be shown by oral evidence, the transferor having the burden of proof; but both were rejected as if inseparable, and the rule as to express trusts—requiring a memorandum—was applied.

1. See 20 Harv. L. Rev. 551.

2. Davies v. Otty (1865) 35 Beav. 208. In that case the plaintiff had married again ten years after his first wife had deserted him. Six years later he was informed that his first wife was still living and fearing a prosecution for bigamy he transferred property to the defendant upon an oral trust to reconvey after the "difficulty" was over. Later the plaintiff discovered that the lapse of seven years from the time he knew his wife was alive protected him against any proceedings for bigamy and he called on the defendant to reconvey. The court held that the Statute of Frauds did not apply and that the plaintiff's conduct was not illegal; see Peacock v. Nelson (1872) 50 Mo. 256; 13 Harv. Law Rev. 227; 12 *id.* 506; 14 Col. Law Rev. 273. If the plaintiff is guilty of fraudulent conduct he is of course barred; 13 Harv. Law Rev. 608 (conveyances in order to defraud creditors); but see Fishbeck v. Gross (1884) 112 Ill. 208 holding that if the creditors did not complain the defendant could not object.

3. Titcomb v. Morrill (1865) 10 Allen 15; Tillman v. Kifer (1910) 166 Ala. 403, 52 So. 309; 6 Col. Law Rev. 549, 14 *id.* 273; 12 Mich. Law. Rev. 423, 515; 9 Harv. Law Rev. 150, 11 *id.* 202; 26 *id.* 661; 20 Harv. Law Rev. 551. In some states the plaintiff is allowed, however, to recover the value of the land in quasi-contract; O'Grady v. O'Grady (1894) 162 Mass. 290, 38 N. E. 196; in others this has been definitely disallowed so that the transaction becomes a total loss to the plaintiff; Mescall v. Tilly (1883) 91 Ind. 96. In still other states the point seems undetermined; Moore v. Horsley (1895) 156 Ill. 36, 40 N. E. 323.

fraud in other facts tends to show that they have not great confidence in the justice of the rule.[4]

§ 291. Same—criticism of prevailing American rule.

The refusal to impose a constructive trust in this class of cases seems to be due to a failure to distinguish clearly between intended trusts on the one hand and constructive trusts imposed as a specific remedy for a wrong, on the other.[1] If A conveys land to B upon an oral trust to reconvey when requested, the oral trust cannot be enforced because of the Statute of Frauds. The enforcement of a constructive trust because of the dishonest retention of the land happens to lead to the same result as would the enforcement of the oral trust. This accidental identity seems to have led American courts to feel that if they should compel the grantee to reconvey the property they would be violating the plain terms of the Statute of Frauds. That this view is wrong is shown not only by the shocking injustice[2]

4. In Gregory v. Bowlsby (1902) 115 Iowa 327; 88 N. W. 822, the petition was held good on demurrer because it alleged that the conveyance had been made at the request of the defendant who at the time did not intend to carry out the oral trust. Catalani v. Catalani (1890) 124 Ind. 54, 24 N. E. 375, was a similar case with the additional fact of intimate relations between the plaintiff and the defendant. In Fishbeck v. Gross (1884) 112 Ill. 208 the court relied on the fact that the defendant induced the plaintiff to convey to him rather than to X; see 18 Harv. L. Rev. 614. For a discussion of the question whether the trustee can execute his oral trust by destroying the deed of conveyance to himself, see 10 Col. Law Rev. 151, 174.

1. See *ante* § 250.

2. This injustice is less in those jurisdictions in which the transferor is allowed to recover the value of the land in quasi contract; see *ante* § 290, note 3. But allowing such a recovery exposes the error of the rule because the basis of constructive trusts is the same as that of quasi contract—to prevent unjust enrichment—the difference consisting in the form of relief. Recovery in quasi contract is sought where it is possible to get or where one prefers a mere money judgment; whereas the decree of a constructive trust gives specific relief; see 18 Harv. Law Rev. 614.

of the result but also by the fact that it is inconsistent with the rule in other classes of cases which are analogous in their facts. If A borrows $5000 from X and conveys to him a piece of land upon X's oral agreement to reconvey upon the repayment by A of the amount borrowed, A may, upon tender of the amount due with interest, compel B to reconvey.[3] This is the settled rule practically everywhere and thoroughly just; but since the doctrine grew up as a part of the law of mortgages instead of as a part of the law of constructive trusts, the inconsistency between the two rules was not obvious. There is, then, this curious situation: if the transferror borrows money from the transferee and conveys land to him upon an oral agreement to hold the land as security, he may get the land back upon tender of repayment; whereas if he does not borrow he cannot get the land back in an otherwise similar case.

There are other lines of cases with which the American doctrine is inconsistent. If A conveys his farm to B in consideration for B's oral promise to convey B's farm to A, A cannot enforce specific performance of B's oral promise, but he may get back his own farm.[4] And if A conveys land to B upon an oral trust for C and B refuses to perform his oral trust, A may get a reconveyance.[5]

§ 292. Conveyance by will upon oral trust.

If A makes an absolute devise to B but with an intention not expressed in the will that B shall hold the

3. Philbrook v. Delano (1849) 29 Me. 410; see 4 Harv. Law Rev. 1, 12..

4. Simons v. Bedell (1889) 122 Cal. 341; 12 Harv. Law Rev. 506, 13 *id.* 610.

5. Hall v. Linn (1885) 8 Colo. 264, 5 Pac. 641; 12 Col. Law Rev. 283; 26 Harv. Law Rev. 661; 20 *id.* 403, 412. See also *In re* Davis (1901) 112 Fed. 129 where M bought land and had the title conveyed to B intending B to hold for the benefit of X. B refused so to hold and he was compelled to convey to M. The court called it a resulting trust, but it should have been called a constructive trust because it was not intended; 15 Harv. Law Rev. 754.

property upon trust for C, B will take beneficially if notice of such extrinsic intent be not communicated to him before the will takes effect—i. e., before the death of A.[1] But if the notice does reach B before the death of A, B is not allowed to hold beneficially; tho instead of imposing a constructive trust for the heirs of A—as would be expected in analogy to the case of a conveyance to deed to B upon an oral trust for C[2]—the courts impose a constructive trust[3] for C.[4] This seems to be squarely in violation of the Statute of Frauds,[5]

1. Juniper v. Batchelor (1868) Weekly Notes 197, Ames Trust Cas. 189; Riordan v. Banon (1871) Irish Rep. 10 Eq. 469: "If you attempt to raise a trust out of some uncommunicated intention, you contravene the express provisions of the statute [of wills], by varying the dispositions of the will by parol evidence." In *In re* Boyes (1884) 26 Ch. D. 531, the grantee admitted the oral trust, and a constructive trust was imposed for the next of kin. In Schultz's Appeal (1876) 80 Pa. 396 this rule was made use of to avoid the effect of the death bed gift act by devising to one who could be relied on to carry out the later communicated wishes of the testator; 8 Col. Law Rev. 593. On the other hand, the fact that the grantee in a deed did not know till after the deed was delivered that he was to hold the property upon a trust not expressed in the deed is no defense; Birch v. Blagrave (1755) Ambler 264; 15 Harv. Law Rev. 753.

2. See *ante* § 291; and see 20 Harv. Law Rev. 554.

3. Where B has promised A in writing that he will hold for C, it is a simple case of specific performance given to the beneficiary of a contract; see *ante* § 90.

4. Buckingham v. Clark (1891) 61 Conn. 204, 23 Atl. 1085; Caldwell v. Caldwell (1871) 2 Bush. (Ky.) 515; 13 Harv. Law Rev. 520. Where the oral promise was made after the will and did not influence the testator the devisee is allowed to hold beneficially; 13 Col. L. Rev. 343, 360. Where the secret trust is not enforcible because illegal there is then a resulting trust for the heir or next of kin; Sweeting v. Sweeting (1863) 10 Jur. N. S. 31 (violation of death bed gift act).

5. Where B's promise is oral or where it is merely inferred from his failure to dissent upon receiving the information of the intended devise and trust, the Statute of Frauds is logically a bar to enforcing the promise whether it is treated as a case of specific performance or as a trust case. It has been suggested that in the usual case of this sort there is no contract because the devisee is making an offer of a unilateral contract which is completely ac-

but it has been suggested as an explanation[6] if not as an entire justification, that the courts were influenced to do this by a strong desire to carry out the testator's intent.[7] This explanation is rendered the more plausible by decisions which have applied the doctrine to cases where the conveyance was by deed but in contemplation of death.[8]

A similar case is presented where the heir orally agrees to hold in trust for C if the prospective devisor will refrain from making a will; C may have a constructive trust declared for himself.[9]

IV. Property acquired by homicide.

§ 293. Testator killed by devisee or legatee.

If a beneficiary of a will should murder the testator in order to prevent the latter from revoking the will,

cepted only by the testator's dying, after which event there is no promisee; 28 Harv. Law Rev. 252. But keeping in mind the tendency of courts to construe a bilateral contract, it would not seem difficult to regard the devisee's assent as an acceptance of the testator's offer. For an exhaustive discussion of this whole subject see 28 Harv. Law Rev. 237-269; 366-393; Constructive Trusts Based on Promises made to Secure Bequests, Devises or Intestate Succession, by Professor Costigan.

6. 20 Harv.. Law Rev. 555.

7. In the ordinary case of a conveyance *inter vivos* upon an oral trust for a third person the grantor may demand a reconveyance from the repudiating grantee, and then get another person to carry out the trust; in the case of the will this is necessarily impossible because the will does not take effect until the testator's death; to declare a constructive trust for the benefit of the heir would of course defeat his intent; 19 Harv. Law Rev. 466.

8. Ahrens v. Jones (1902) 169 N. Y. 555, 62 N. E. 666; 19 Harv. Law Rev. 466. And see Reardon v. Reardon (1914) 219 Mass. 594, 107 N. E. 522, where the case was made stronger by the fact that the grantee induced the conveyance to herself; and see 13 Harv. Law Rev. 227.

9. Dixon v. Olmius (1787) 1 Cox Eq. 414. As to whether the promise of one binds others see 21 Harv. Law Rev. 286 discussing Powell v. Yearance (1907) 73 N. J. Eq. 117, 67 Atl. 892. See also 24 Harv. Law Rev. 578.

it would seem clear enough that either by statute or decision the beneficiary should be prevented from profiting by his crime. Upon this point, however, there are three different lines of authority. In some states it has been held that the commission of the crime does not affect the rights of the beneficiary, the latter retaining both the legal and equitable interests in the property.[1] In others the beneficiary does not even get the legal title,[2] so that a *bona fide* purchaser from the beneficiary is not protected.[3] The objection to this view is that it seems a plain violation of the Statute of Wills which makes no such exception.[4] The third view is that altho the legal title passes to the beneficiary according to the terms of the will equity will impose upon him a constructive trust for the benefit of the heir or the next of kin[5] of the testator, in order to prevent him from profiting by his crime.[6]

The last seems, on the whole, to be the best view in the absence of specific legislation on the matter.

1. Shellenberger v. Ransom (1894) 41 Neb. 631, 59 N. W. 935; 27 Harv. Law Rev. 280; 30 Am. L. Rev. 130. The earlier holding in the same case (1894) 31 Neb. 61, 47 N. W. 700 was exactly opposite, namely, that not even legal title passed and hence a *bona fide* purchaser was not protected; 8 Harv. Law Rev. 170.

2. Riggs v. Palmer (1889) 115 N. Y. 506, 22 N. E. 188; 3 Harv. L. Rev. 234; 4 *id.* 394; 8 *id.* 170; 9 *id.* 474. See also Perry v. Strawbridge (1908) 209 Mo. 621, 108 S. W. 641; 11 Col. Law Rev. 180; 64 U. of Pa. Law Rev. 307.

3. In 27 Harv. Law Rev. 280, it is urged that it is undesirable that the *bona fide* purchaser should be protected and that therefore there should be legislation providing that legal title shall not pass to the felon; see Cal. Civil Code (1906) § 1409.

4. See 8 Harv. L. Rev. 170; 27 *id.* 280.

5. It has been urged that this is unduly liberal to the heir or next of kin who, even if the testator had revoked this particular will, might have been cut off by the making of another will; 27 Harv. L. Rev. 280, 28 *id.* 426. The answer is that it is better that they should profit than the felon.

6. Ellerson v. Westcott (1896) 148 N. Y. 149, 42 N. E. 540, 64 U. of Pa. Law Rev. 307; 45 *id.* 225.

§ 294. Ancestor killed by prospective heir—insurance cases.

If an ancestor is killed by a prospective heir in order to prevent his making a will which would destroy or reduce the heir's share in the estate, the problem is similar to that in the preceding section.[1] Where it is clear whom the intended will was to benefit, it would seem the best solution to impose a constructive trust upon the wrongdoer for the benefit of such intended beneficiaries.[2] Where it can not be shown who the intended beneficiaries were, the constructive trust should be for those next entitled after the felon.

Where the killing, tho felonious, was not done in order to obtain the property, the case is not so strong against the wrongdoer and it seems fairly likely that he would be allowed to keep.[3]

A somewhat analogous situation is presented where the beneficiary of a life insurance policy murders the insured in order to be able to collect on the policy. Recovery on the contract is properly refused to the beneficiary,[4] but it seems to be the better view that

1. See *ante* § 293. There has been some tendency to be less severe where the heir was the felon on the ground that the heir takes unconditionally by the positive laws of the state and not by the voluntary act of the decedent. But the attempted distinction has little merit; see 64 U. of Pa. Law Rev. 307; and see 11 Col. Law Rev. 180 criticising *In re* Gollnik's Estate (1910) 112 Minn. 349, 128 N. W. 292 (widow who murdered her husband allowed her statutory inheritance). See also *In re* Carpenter's Estate (1895) 170 Pa. St. 203, 32 Atl. 637, 30 Am. Law Rev. 130.

2. In analogy to the cases of a devise or bequest upon an oral trust communicated to the transferee before the will took effect; see *ante* § 292.

3. In Estate of Fox (1914) 52 N. Y. L. J. 1115, a husband, intending to kill a third person, killed his wife; tho convicted of manslaughter he was allowed to share in the wife's property under the statute of distribution; see 28 Harv. Law Rev. 426.

4. Insurance Co. v. Armstrong (1885) 117 U. S. 591, 14 Harv. Law Rev. 375.

the insurance company should not escape liability but should be compelled to pay to the insured's estate.[5]

V. Property acquired by wrongful use of another's property.

§ 295. Purchase by trustee or other fiduciary.

If a trustee or other fiduciary[1] misapplies the money or other property held by him in his fiduciary capacity in the purchase of other property for his own benefit, he may be declared constructive trustee of such property for the benefit of the *cestui* or other beneficiary.[2] If such a remedy will not make the beneficiary whole, he has a personal claim against the fiduciary for the difference. On the other hand, if the property thus purchased should increase in value, the constructive trust remedy enables the beneficiary to avail himself of such increase.[3]

§ 296. Purchase by converter or disseisor.

If a stranger disseises a trustee of trust land or converts trust chattels, he can not be held as constructive trustee of such property because he does not claim

5. Box v. Lanier (1904) 112 Tenn. 393, 79 S. W. 1042.

1. Such as executor, agent, bailor, guardian, conservator, etc.

2. Shaler v. Trowbridge, (1877) 28 N. J. Eq. 595 (one partner took partnership money and bought for his wife land and life insurance policies and died; his widow was held as constructive trustee for the partnership); Lane v. Dighton (1762) 1 Amb. 409 (statute of frauds no bar to claim of beneficiary). And see 2 Harv. Law Rev. 28-39. The Right to Follow Trust Property, by Professor Williston; and 19 *id.* 511-523, Following Misappropriated Property into its Product, by Professor Ames.

3. Where the investment has been made in insurance policies or corporation stock or land the increase may be very large; see Shaler v. Trowbridge, *supra*. "This excess above full compensation is not given to the *cestui que trust* by reason of any merit on his part. It comes to him as a mere windfall. Public policy demands that the faithless trustee should not retain any advantage derived from his

in privity with the trustee but claims adversely to him[1] and may insist upon having the question of title between himself and the trustee[2] tried at common law.[3] Similarily, if the land and chattels were not held in trust the converter or disseisor cannot be held as constructive trustee by the owner, but must be sued at law in trover or ejectment. If, however, in either of the cases stated *supra* the converter or disseisor should sell the property whose possession he has acquired and should invest the proceeds in other property, there is no common law action to obtain such newly acquired property—because as to such property he gets title from his vendor—and equity should declare a constructive trust thereof. For tho the right to bring trover or ejectment for the original property is not cut off by any transfer made by the converter or disseisor, such property may have depreciated in value[4] and the converter or disseisor may now be insolvent; furthermore the newly acquired property may have greatly increased in value.

The authorities, however, are in conflict as to the converter[5] and what little authority there is as to the

breach of trust. Hence the wholesome rule that whatever a trustee loses in the misuse of the fund he loses for himself, and whatever he wins, he wins for the beneficiary." Professor Ames, 19 Harv. Law Rev. 512.

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1. See *post* § 309.

2. Since the disseisor or convertor claims for himself, he may properly insist that the fact that the property is held in trust does not affect him;—at least as a matter of procedure. See *ante* § 280.

3. Since the disseisor or convertor does not acquire title by his wrongful act, the common law remedy is usually adequate.

4. Or, in case of chattels, it may be difficult if not impossible to find either the chattels themselves or the purchaser thereof.

5. In Campbell v. Drake (1844) 4 Ired. Eq. 94, one F, while a clerk in a retail store had stolen some money from his employer and invested it in a tract of land. F died and the land descended to his brothers and sisters. The court refused to declare a constructive trust because F "was, in truth, guilty of a felony in possessing himself of the plaintiff's effects for the purpose of laying them out for

disseisor is against any equity relief.[6] To deny equitable relief results in the anomaly that one who obtains property by conversion—whether felonious or not—is in a better situation than one who has obtained property by fraud or mistake[7] or breach of trust;[8] in the latter situations it is well settled that the defendant may be held as constructive trustee of the proceeds of the property no matter how many times the form of the investment has been changed.

As in other cases of constructive trust, the remedy is not available against a *bona fide* purchaser.[9]

his own interest; and that fully rebuts the idea of converting him into a trustee. If, indeed, the plaintiff could actually trace the identical money taken from him in the hands of a person who got it without paying value, no doubt he could recover it; for his title was not destroyed by the theft. But we do not see how a felon is to be turned into a trustee merely by showing that it was stolen money." In Newton v. Porter (1877) 69 N. Y. 133, W and L had stolen negotiable bonds from the plaintiff, sold them, loaned the proceeds on promissory notes and then transferred the notes to the defendants who were attorneys defending them in a criminal prosecution. The court declared a constructive trust of the notes, the defendants not being *bona fide* purchasers, "the absence of the conventional relation of trustee and *cestui que trust* between the plaintiff and W and L being no obstacle." See 59 U. of Pa. Law Rev. 39.

6. In Brigham v. Winchester (1843) 6 Met. (Mass.) 460 the court refused to allow an action for money had and received against a disseisee for the proceeds of the sale of the land; 19 Harv. Law Rev. 514.

7. The subject of equitable relief where property has been obtained thru fraud or mistake will be discussed in Chapter VI. on Reformation of Instruments and in Chapter VII on Rescission. See also 22 Harv. Law Rev. 449; 21 *id.* 434.

8. The court in Newton v. Porter *supra* calls attention to this anomaly.

9. In Dixon v. Caldwell (1864) 15 Oh. St. 412, X stole a military bounty land warrant from the plaintiff, forged the plaintiff's indorsement thereon and sold it to the defendant who paid value therefor without notice of the theft or forgery. The defendant surrendered the warrant to the government in exchange for a patent to 160 acres of land. Having received the title to the land in good faith for value he was entitled to the protection given to a *bona fide* purchaser; hence the plaintiff's sole remedy against him was for the conversion

§ 297. Mingling of funds by trustee—tracing trust funds.

If a trustee[1] wrongfully mingles trust money with his own, the trust attaches to the entire amount, the *cestui* having an equitable lien on it or any part thereof for the amount of the trust money thus commingled. Hence, if part of the money be lost, even accidentally, the lien may be enforced to the full amount against the residue.

A common case of mingling occurs when the trustee deposits trust money with his own in his own name. If he later withdraws a part of the money—by check or otherwise—and dissipates[2] it, such withdrawals are charged against his own interest in the deposit;[3] and so long as enough is left in the account to equal the amount of trust funds, the *cestui* is protected by giving him an equitable lien.[4] But if the whole is withdrawn[5] or is reduced below the amount of the trust funds, the *cestui* will lose either entirely or *pro tanto*[6] as the case

of the warrant to which the defendant did not get title and where therefore his good faith and payment of value afforded no defense.

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1. Practically everything in this and the following section is also true of other intended fiduciaries, such as executors, agents, etc.; *In re* Hallet's Estate (1879) 13 Ch. D. 696, 709.

2. For example, if he pays his own debts with it; see *infra*, note 9.

3. This and other rules on this subject are frequently stated in terms of presumptions; 9 Col. Law Rev. 716. Thus it is said that it should be presumed that the trustee meant to draw out what he had a right to use,—namely, his own money; see 2 Harv. Law Rev. 36. This is, of course, a fictitious way of stating the rule and has sometimes led to erroneous results; see 27 Harv. Law Rev. 129, 132, note 21. See *infra*, note 8. The same principle is involved in Belknap v. Belknap (1862) 5 Allen 468, Ames Trust Cas. 342. If one of several *cestuis* is also trustee and he misappropriates a part of the trust property, his *co-cestuis* are entitled to the remainder.

4. Nothing turns upon the order in which the various deposits were made; Knatchbull v. Hallett (1879) 13 Ch. Div. 696, 726; 27 Harv. Law Rev. 130.

5. *In re* M. E. Dunn & Co. (1912) 193 Fed. 212.

6. Woodhouse v. Crandall (1902) 197 Ill. 104, 64 N. E. 292. If in such a case the account is later increased by deposits of the trustee's

may be, if the trustee becomes insolvent; for while the trustee is of course liable personally for his breaches of trust to the full extent of the *cestui's* loss, yet in a contest between the *cestui* and the general creditors of an insolvent trustee the *cestui* cannot ordinarily be a preferred claimant unless he is able to trace the trust funds.[7]

Where the amount withdrawn has not been dissipated by him but has been invested in property, the weight of authority and better view allows the *cestui* to have an equitable lien on this property.[8] This is highly important to the *cestui* if the balance of the account has been dissipated by the trustee.[9]

The above discussion applies also to cases where there is a constructive trust based upon other wrongs besides breaches of trust. It is fraudulent conduct

own money, it does not increase the rights of the *cestui* as against the general creditors of the trustee, because the duty to make reparation is a mere personal one; Roscoe v. Winder (1915) 1 Ch. 62 (account reduced to £25 and later increased to £358; entitled to preference only to the £25). See 27 Harv. Law Rev. 136; 16 *id.* 148.

7. Spokane County v. First National Bank of Spokane (1895) 68 Fed. 979.

8. *In re* Oatway (1903) 2 Ch. 356. If the rule of presumption given *supra*, note 3, had been followed,—that the first withdrawals are the trustee's own money—the *cestui* would have been confined to the residue and therefore would have had no preferred or property claim, but would have been compelled to come in with the general creditors; Board of Comm'rs v. Strawn (1907) 157 Fed. 49; 27 Harv. Law Rev. 132; 13 Col. Law Rev. 556; 9 *id.* 716.

9. If the trustee pays his own debts with trust money the money is considered as dissipated and not commingled or invested; hence the *cestui* must come in with the general creditors; Slater v. Oriental Mills (1893) 18 R. I. 352, 27 Atl. 443: "There is no swelling of the estate, for the money is spent and gone . . . The creditors have done no wrongful act, and should not be called upon in any way, to atone for the misconduct of their debtor. It is an ordinary case of misfortune on the part of the claimants, whose confidence in a trustee or agent has been abused." See 2 Harv. Law Rev. 38. See also 12 Harv. Law Rev. 221, criticising Evangelical Synod v. Schoenich (1898) 143 Mo. 652, 45 S. W. 647, for giving preference to a *cestui* where the trustee placed trust funds in the hands of a firm that used the funds in its business and then became insolvent.

in bank officials to accept deposits after they know of the bank's insolvency; hence, if the depositor can trace his property in such a case he is entitled to claim it as against the general creditors of the bank; but if it has been dissipated—for example, paid out again to meet other checks—he is not entitled to any such preference. Tracing the actual money thus deposited is usually impossible because it is ordinarily mingled at once with the general assets of the bank; but where the deposit was made so soon before the bank stopped payment that the depositor can clearly show that the general assets of the bank at that time were increased by such deposit, he should be allowed a preferred claim to that extent.[10]

The principles above discussed apply also to conversion[11] and to obtaining property by fraudulent representations.[12]

§ 298. Same—mixture invested in property.

If at any time the trustee should invest the commingled funds or any part thereof in property, the *cestui's* equitable lien will attach to this property;[1] and if the property should not increase in value, the *cestui* will not be interested in any other property

10. See 14 Harv. Law Rev. 235 discussing Richardson v. New Orleans etc. Co. (1900) 102 Fed. 780. See 2 Harv. Law Rev. 36; 20 *id.* 69. On the personal liability of the bank directors who allow the deposit to be made see 14 Harv. Law Rev. 464. See 15 Harv. Law Rev. 404 as to the liability of a bucket shop to repay to the *cestui* the entire amount "invested" by the trustee on margins which were wiped out when the market fell. As to the personal liability of the servant of a trustee for misuse of trust funds, see 13 Harv. Law Rev. 530.

11. See 23 Harv. Law Rev. 306 discussing *In re* Brown (1909) 171 Fed. 254.

12. See 9 Harv. Law Rev. 225 discussing American Sugar Refining Co. v. Fancher (1895) 145 N. Y. 552, 40 N. E. 206.

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1. In Massachusetts this is the *cestui's* sole remedy against the property; Bresnahan v. Shoehan (1878) 125 Mass. 11; 19 Harv. Law Rev. 512.

remedy. But if there should be such increase it would seem that he ought to be allowed to avail himself of his proportional part of the profit; this can be accomplished by imposing a constructive trust upon the property, and thus giving the *cestui* a *pro rata* share therein. By the weight of authority and the better view the *cestui* is entitled to choose[2] between the equitable lien and a proportional part of the property.[3]

Where the trustee commingles money of two or more persons without contributing any of his own, and invests it profitably in property, each is entitled to a *pro rata* share of the property.[4]

VI. Property acquired by fiduciary with his own funds.

§ 299. Taking renewal of lease.

In order to give full protection to a beneficiary, his fiduciary is not allowed to make a profit out of his fiduciary position. Even if a fiduciary uses his own funds in acquiring property his fiduciary duty with respect thereto may be such that the beneficiary may compel him to hold it upon a constructive trust. For example, it has been held that a trustee of leasehold property who takes a renewal of the lease for his own benefit may be compelled to hold it for the benefit of the *cestui*, even tho the lessor had refused to renew for the benefit of the *cestui* because he was an infant.[1] But apparently

2. Fant v. Dunbar (1893) 71 Miss. 576, 15 So. 30 (entitled to an accounting before choosing); 27 Harv. Law Rev. 128. And see 11 Harv. Law Rev. 131 criticising Clark v. Timmons (1897) 39 S. W. 534 (Tenn. Ch. App.).

3. In New Jersey the *cestui* is allowed to take the entire property subject only to an equitable lien for the amount of money furnished by the trustee; this gives the *cestui* the entire profit; Bohle v. Hasselbroch (1901) 64 N. J. Eq. 334, 51 Atl. 508.

4. Lord Provost v. Lord Advocate (1879) 4 App. Cas. 823.

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1. Keech v. Sandford (1726) Sel. Cas. in Chancery 61; "If a trustee, on the refusal to renew, might have a lease to himself, few trust estates would be renewed for the benefit of *cestuis;*

the flat rule does not apply to buying the reversion;[2] the fiduciary may buy it for himself provided he acts openly in regard to the matter.[3]

Similar reasoning applies, of course, to any gratuities which come from third parties to the fiduciary because of the latter's position, even tho no harm is done the beneficiary thereby.[4] And when a fiduciary compromises a claim against the estate of the beneficiary he is entitled only to reimbursement,[5] not to the face value of the claim.

tho I do not say there is a fraud in this case, yet he should rather have let it run out than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that the rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting the trustee have the lease on refusal to renew to the *cestui*." See also Essex Trust Co. v. Enright (1913) 214 Mass. 507, 102 N. E. 441, where the rule was applied against a newpaper reporter who had learned through his employment that the premises leased by his employer had peculiar value for him. There has been a disposition to be a little more liberal to directors of a corporation; Sandy River R. Co. v. Stubbs (1885) 77 Me. 594, 2 Atl. 9, 7 Col. Law Rev. 538. See also 14 *id.* 539, 608. In Lurie v. Pinanski (1913) 215 Mass. 229, 102 N. E. 629, the fact that the plaintiff had unsuccessfully attempted to get a new lease of partnership property for himself was held no bar to a suit for an accounting because unclean hands "must have an immediate and necessary relation to the equity sued for."

2. There is not the direct competition with the *cestui* in such a case as there is in the renewal case.

3. Anderson v. Lemon (1853) 4 Seld. 236.

4. Magruder v. Drury (1914) 235 U. S. 106 (trustee was a member of a brokerage firm which received commissions for investing trust moneys; since it was the trustee's duty to invest the trust funds he should not be allowed to keep the commissions which are a profit realized from his position).

5. In Baugh's Executor v. Walker (1883) 77 Va. 99 the trustee paid $900 to lift a lien from the trust estate but he paid it at a time when Confederate money was the sole currency of the country; it was held that he was not entitled to charge the trust estate $900 in gold but only the value of what he paid.

§ 300. Fiduciary with authority to sell or to buy.

If a fiduciary has authority to sell property for his beneficiary and he conducts a public sale of it, there is a flat rule that if he buys at the sale he may be compelled to hold it for the beneficiary[1] even tho the transaction was in good faith.[2] There is, however, no flat rule forbidding his buying at a private sale from the beneficiary; but such a sale will be set aside unless the fiduciary shows that he divested himself of every advantage which he had gained from his fiduciary position, by disclosing to the beneficiary whatever knowledge he may have acquired relative to the value of the property.[3]

As already explained,[4] if purchase money is furnished by A and the title to property purchased is taken in the name of B, a non-dependent, there is a presumption of a resulting trust in favor of A. Where, however, B has been entrusted with the purchase money belonging to A and has instructions to take title in A's name, but instead has the title transferred to himself, paying A's money therefor, there is, of course no resulting trust;[5] but since A's money was used there is no difficulty in imposing a constructive trust upon the property in which it was invested.[6] If in such a case B should

1. *Ex parte* Lacey (1802) 6 Ves. 625. The rule has also been applied to a sale to the fiduciary's husband; 2 Col. Law Rev. 419, discussing Frazier v. Jeakins (1902) 64 Kan. 615, 68 Pac. 24. As to how far directors of a corporation come within the rule see 21 Harv. Law Rev. 51.

2. The court may, in its discretion, confirm a sale to the fiduciary; Scholle v. Scholle (1886) 101 N. Y. 167, 4 N. E. 334, 1 Col. Law Rev. 562.

3. *Ex parte* Lacey, *supra*: "The rule I take to be this, not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself. If a trustee will so deal with his *cestui que trust*, that the amount [?] of the transaction shakes off the obligation, that attaches upon him as trustee, then he may buy."

4. See *ante* § 282.

5. Because no trust of any sort was intended.

6. See *ante* § 295.

use his own money to buy the land, the case should be decided in exactly the same way[7] except that A must, of course, reimburse B for the amount thus paid. But where B's authority is merely oral, courts have sometimes failed to reach a correct conclusion because they stop with finding that there is no resulting trust and that the oral trust is unenforcible because of the Statute of Frauds.[8] But such courts are astute to give relief if they can find some fraud[9] in addition to the breach of the oral authority.[10]

F. Transfer of Trust Property.

I. By act of the trustee.

§ 301. Elements of bona fide purchase for value—(1) paying value.

It has already been found necessary in the chapter on specific performance[1] to trace the rise and development of constructive obligations and also to state briefly the limiting doctrine of *bona fide* purchase for value without notice. In order that one may successfully avail himself of this defense it must appear that he has

7. See 12 Harv. Law Rev. 438 discussing Halsell v. Wise Co. Coal Co. (1898) 19 Tex. Civ. App. 564, 47 S. W. 1017.

8. Fischli v. Dumaresly (1820) 3 A. K. Marsh (Ky.) 23 (oral agreement between plaintiff and defendant to purchase jointly, defendant to loan half the money to the plaintiff; defendant took the conveyance to himself instead of to the plaintiff and defendant jointly).

9. In Wakeman v. Dodd (1876) 27 N. J. Eq. 564 the court in giving relief relied on the fact that the defendant was the plaintiff's confidential adviser. In Judd v. Moseley (1871) 30 Iowa 423 the court relied upon the representations made by the defendant that he would obtain a tax title and convey it to the plaintiff's assignor if the latter would refrain from redeeming the land from a tax sale.

10. The subject of constructive trusts will be further discussed incidentally in the next few sections.

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1. See *ante* § 84, 85. See also 18 Harv. Law Rev. 53.

complied with three conditions: (1) that he has paid all or at least a substantial part of the purchase price; (2) that he has received title; (3) that he has done both before notice of the rights of the beneficiary.

If the transferee has bought and received the conveyance in good faith from the trustee but has received notice of the trust before actually paying any of the purchase price, the *cestui* may have him declared a constructive trustee and get a reconveyance even tho the purchaser has given his notes and a mortgage and is willing to pay to the *cestui*.[2] Tho the rule is well settled it seems unfair to take away the property from the transferee after he has changed his position[3] by binding himself for the purchase price; and we have the anomaly that the *cestui* is thus given a choice of remedies against one who is as innocent as himself. For if the *cestui* prefers, he may affirm the transaction and compel the purchaser to pay the purchase price to him.

That the purchaser must pay some of the purchase price before notice to be entitled to keep is clear, but as to whether he must pay all or only a part thereof there is a conflict of authority. The weight of authority[4]

2. Halsa v. Halsa (1843) 8 Mo. 303, 309.

3. Where the purchase price for the property has been marriage with the trustee the weight of authority seems to be that the transferee may keep the property tho the marriage did not take place before the notice of the trust; Smith v. Allen (1862) 5 Allen (Mass.) 454 (marriage was prevented by death). See *contra* Lionberger v. Baker (1885) 88 Mo. 447. This can only be reconciled with the general rule by drawing a distinction between contracts to marry and ordinary commercial contracts, in that entering into an engagement to marry usually involves a more serious change of position. This was the argument in Smith v. Allen, *supra*. See 18 Harv. Law Rev. 149.

4. Florence Co. v. Zeigler (1877) 58 Ala. 221; *contra*, Haughwout v. Murphy (1870) 21 N. J. Eq. 118 (*cestui* entitled to an equitable lien on the property for that part of the purchase money still unpaid).

and logical view[5] is that he is not entitled to keep unless he has paid in full, but is entitled to hold the property as security for what he paid in good faith before notice.[6]

If the transferee did not even bargain to pay anything for the trust property, he is, of course, not entitled to keep it.[7] But where he received the title in good faith he has obviously committed no wrong in thus receiving it; his wrong consists in retaining it after notice of the equity.[8] If he should dispose of it before receiving such notice he would be liable to the *cestui* only for what he had left of the proceeds at the moment he received notice;[9] hence, if he has given it away, he is not liable at all. And if he should receive a reconveyance of the property after it has passed through the hands of a *bona fide* purchaser for value, he may keep it.[10]

One who gives up a pre-existing claim against the trustee in exchange for trust property should be considered as having given up present value; where he merely accepts the trust property as collateral security for the pre-existing debt he does not give value at the time of taking the property but his later conduct in not suing is nearly always so influenced thereby that it would not be illogical to protect him as a *bona fide* purchaser for value.[11] A judgment creditor does not give

5. Because it is difficult to draw a logical distinction between payment of none and payment of all. If a part is enough, how large a part?

6. Daugherty v. Cooper (1883) 77 Mo. 528; see 9 Harv. Law Rev. 547. In a few cases it has been held that if the transaction is not a business transaction, the transferee is entitled only to be made whole even if he has paid the full purchase price; Rummonth v. White (1900) 61 N. J. Eq. 358, 47 Atl. 1; 14 Harv. Law Rev. 301.

7. Giddings v. Eastman (1836) 5 Paige 561, Ames Trust Cas. 517.

8. See 19 Harv. Law Rev. 511, 515.

9. Robes v. Bent (1699) Moo. K. B. 552.

10. Mast v. Henry (1884) 65 Iowa 193, 21 N. W. 559. See *post* § 305, note 3. For a more complete discussion of the subject, see 19 Harv. Law Rev. 515, 516, by Professor Ames.

11. See Williston, Sales § 620. The Uniform Sales Act defines value as "any consideration sufficient to support a simple

up present value[12] and therefore takes subject to equities; but if he buys the property at the execution sale, he ought to be considered as giving value because even tho a judgment creditor ordinarily pays no cash at the execution sale but merely credits the amount of the purchase price on his claim, the extinguishment of his claim should be considered as value.[13] Since as judgment creditor he takes subject to equities, he must pay over the purchase price in cash instead of having it credited on his claim against the trustee.[14]

§ 302. (2) Getting title.

Even tho the transferee has paid all the purchase price before notice of the trust, he is not protected if he has failed to get title.[1] In such a case he has, of course, an equitable right to call upon the trustee for a conveyance; but the *cestui* has a similar equitable right, equally meritorious, which is prior in time.[2] As between equities otherwise equal, the one which is prior in time prevails.[3] Furthermore, to allow the

contract. An antecedent or pre-existing claim, whether for money or not, constitutes value where goods or documents are taken either in satisfaction thereof or as security therefor." See 10 Harv. Law Rev. 134.

12. Another reason why he takes subject to equities is that he does not get title even if he attaches the property. See Thompson v. Rose (1844) 16 Conn. 71; but see Van Duzor v. Allen (1878) 90 Ill. 499.

13. This is the better view, but there is conflict of authority; Sanger Bros. v. Collum (1903) 78 S. W. 401, (Tex. Civ. App.): 17 Harv. Law Rev. 63, 498. See *contra*, Williams v. McIlroy (1879) 34 Ark. 85. See also 11 Col. Law Rev. 798.

14. If he gets the property at a bargain at the execution sale, the right to keep the land and pay cash for it may be quite valuable.

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1. The qualifications of this statement are discussed *infra* and *post*, §§ 303, 304.

2. See 22 Harv. Law Rev. 151, criticising an article in 24 Law Quarterly Rev. 147 in which it was urged that the *cestui* should be protected even tho the purchaser does get the legal title.

3. See *ante* § 28.

transferee to improve his position by taking a conveyance after knowledge of the equity would be placing a premium upon dishonesty.[4]

Even tho the transferee has not actually received the conveyance of the legal title, still if he is in such a position that the transfer is a mere ministerial act which involves no discretion and may be compelled by a writ of mandamus, he is considered as being in an equivalent position.[5]

Furthermore, he need not have the legal title conveyed to himself; it is sufficient if it is conveyed at his direction to another who receives it in good faith. This is true because he might have taken the conveyance to himself and then conveyed it to the third person either upon trust or by way of gift; since he can do this effectually, there is no reason why he may not arrive at the same result by a conveyance directly to the third person.[6]

If instead of selling the trust property the trustee mortgages it or—if it is personal property—pledges it, the mortgagee or pledgee will be protected to the extent

4. Saunders v. Dehew (1692) 2 Vernon 271, Ames Trust Cas. 289. In the English law of mortgages, however, a third mortgagee who had advanced his money without notice of any second mortgage is entitled—even after such notice—to buy in the first mortgage and tack his third mortgage thereto, thereby getting priority for his third mortgage over the second. This has never been followed in this country and has been criticized in England. Even if the third mortgagee had bought in the first mortgage—and therefore the legal title—without notice of the second mortgage, he should not be allowed to improve the position of his third mortgage thereby. See 1 Harv. Law Rev. 14-16.

5. Dodds v. Hills (1865) 2 Hemming & Miller 424, Ames Trust Cas. 297 (mortgagee of shares received from trustee a transfer which entitled the former to have the transfer registered on the books of the company). It is of course too late if the instrument of transfer is not executed by the trustee till after notice of the trust; Shropshire Co. v. The Queen (1875) 7 H. of L. 496, Ames Trust Cas. 300. See Duff v. Randall (1897) 116 Cal. 226, 48 Pac. 66 (purchaser at foreclosure sale gets certificate of sale which entitles him to sheriff's deed). See 11 Harv. Law Rev. 131; 23 Yale Law Journal 193-213; 447.

6. New Banking Co. v. Montgomery (1877) 95 U. S. 16.

of his advances;[7] tho a pledgee never gets title and in many jurisdictions in the United States a mortgagee of land gets a legal lien instead of title, the doctrine of *bona fide* purchaser protects the mortgagee or pledgee who advances his money in good faith.[8]

§ 303. Same—transfer of choses in action.

If the trustee instead of transferring land or tangible chattels should transfer negotiable choses in action the doctrine of *bona fide* purchase for value may apply because the trustee can in such a case transfer title.[1] If the chose in action is not negotiable,[2] he cannot—unless the obligor assents—transfer title to his transferee; he can give only a power of attorney to collect the chose in action for his own benefit.[3] Whether the doctrine of *bona fide* purchase for value should apply so as to protect such a purchaser against the *cestui's* equity there is a conflict of authority.[4] The argument in favor of protecting him is that altho he does not have title he has a legal as distinguished from a merely equitable right,[5] and hence he should not be deprived of it if he

7. In the Uniform Sale of Goods Act there is an express provision that "purchaser includes mortgagee and pledgee." Williston, Sales § 619.

8. As to how far the doctrine of *bona fide* purchase for value will protect the buyer of an idea or design, see 21 Harv. Law Rev. 634.

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1. If payable to bearer, by mere delivery; if payable to order, indorsement is necessary. See *ante* § 261.

2. See *ante* § 261.

3. See 1 Harv. Law Rev. 6-8; 3 *id.* 340, 341.

4. In England and a large number of jurisdictions in this country the purchaser is not protected; Cave v. Mackenzie (1877) 46 L. J. R., Ch. 564, Ames Trust Cas. 308; Schafer v. Reilly (1872) 50 N. Y. 61. See *contra* Williams v. Donnelly (1898) 54 Neb. 193, 74 N. W. 601, 12 Harv. Law Rev. 140; 23 *id.* 310.

5. See 1 Harv. Law Rev. 7; 23 *id.* 310. As to whether the purchaser of a power of attorney to convey land should be protected by the doctrine of *bona fide* purchase for value, see 15 Harv. Law Rev. 226.

has acquired by paying value an equity equal in merit to that of the *cestui*.[6]

If the owner of a non-negotiable chose in action is induced by fraud to assign it to X who in turn assigns it to Y who pays value for it in good faith without notice of the fraud, the situation is similar, the equity of fraud being substituted for breach of trust; here also, there is a conflict of authority, tho the weight of authority and the better view favor the purchaser.[7]

§ 304. Same—transfer of equitable interests.

If the trustee in violation of his trust mortgages trust property to X and then gives a second mortgage—i. e. mortgages the equity of redemption—to Y, it is clear that the doctrine of *bona fide* purchaser for value applies to X because he gets legal title;[1] as to whether it applies to Y also there is a conflict of authority. Decisions which protect the *cestui* against the purchaser[2] are usually supported on the basis that the *cestui's*

6. It is well settled that a purchaser of a non-negotiable chose in action takes subject to any equities in favor of the obligor—such as fraud, failure of consideration, etc. The *cestui* not being a party to the chose in action, his equity is usually referred to as a "latent" equity. Another argument in favor of protecting the purchaser against the *cestui* is that although he can look up the obligor and ascertain whether he has any defenses, because he knows or may know who he is, he has no such opportunity to find out the existence of the *cestui's* equity because the latter is not a party to the chose in action.

7. See Moore v. Metropolitan Bank (1873) 55 N. Y. 41 protecting the purchaser; *contra*, Brown v. Equitable Life Assurance Co. (1899) 75 Minn. 412. See also 23 Yale Law Journal 193-213, Purchase for Value Without Notice, by Professor Kenneson; and an answer to it in 23 Yale Law Journal 447-450 by W. A. Seavey.

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1. According to the old theory of mortgages; in many states in this country the first mortgagee gets a legal lien; see 4 Harv. Law Rev. 1, 12, The Story of Mortgage Law.

2. Cave v. Cave (1880) 15 Ch. Div. 639, Ames Trust Cas. 311; see also Bates v. Johnson (1859) Johnson 304, Ames Trust Cas. 292, where there were three mortgages by the trustee and the third mortgagee had bought in the first mortgage after notice; the decision was placed on the ground of tacking. See *ante* § 302, note 4.

right has ceased to be merely that of a claimant against the trustee and has become a property right which can be cut off only by a transfer of the legal title by the trustee.[3] Decisions which protect the purchaser against the *cestui* are usually justified on the ground that the doctrine of *bona fide* purchaser for value without notice is a salutary one and should be extended to the protection of other property rights than legal interests.[4]

A similar question arises where a *cestui* declares himself trustee of his equitable interest for A and then assigns it to B; or where the *cestui* is induced by fraud to assign his trust interest to D who in turn assigns to E who pays value without notice of the fraud. B and E will be protected only if the doctrine of *bona fide* purchaser is extended to equitable interests.[5]

§ 305. (3) Without notice.

Ordinarily one must both get the legal title and pay value before notice of the trust or other equity in order to be protected.[1] But if the property has once passed into the hands of a *bona fide* purchaser for value without notice, the equities are cut off and do not reattach[2] unless the property comes again into the hands of the trustee or some one else who is under a duty to

3. See 28 Harv. Law Rev. 507; and see *ante* § 280.

4. See 24 Harv. Law Rev. 490; 12 Col. Law Rev. 156; 1 Harv. Law Rev. 11.

5. Sturge v. Starr (1833) 2 M. & K. 195. And see Newman v. Newman (1885) 28 Ch. D. 674, Ames Trust Cas. 335. In Phillips v. Phillips (1861) 4 DeG., F. & J. 208, Ames Trust Cas. 331, the *cestui* of land granted an annuity to A and then assigned his entire interest to B. It was held that B took subject to A tho he paid value in good faith. The decision is quite easy to justify on the *in rem* theory; see *ante* § 280; 23 Yale Law Journal. 450. In reconciling the decision with the *in personam* theory Professor Ames has suggested the analogy of the legal rent charge which diminishes the interest of the grantor of the charge; see 1 Harv. Law Rev. 10.

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1. See *ante* § 301.

2. Halsa v. Halsa (1843) 8 Mo. 458, Ames Trust Cas. 286 note

reacquire the property for the *cestui;*[3] other transferees, even if they pay no value and have notice of the equity, are protected. A practical reason for so holding is that if such transferees were not protected the *bona fide* purchaser might find it very difficult to sell his property where the breach of trust or other misconduct had become well known; this would be especially true in case of land.[4]

In order to be chargeable with notice it is not necessary that the purchaser should have had actual knowledge of the breach of trust or other misconduct; it is probably sufficient if he knew such facts as would put a prudent man upon inquiry.[5] Hence, if he knows that his vendor is a trustee he is usually chargeable if it turns out that the trustee had no authority to sell.[6]

3. The rule applies to the original trustee or constructive trustee—Johnson v. Gibson (1886) 116 Ill. 294, 6 N. E. 205 (defrauding grantee); and also to those who have held the property with notice of the trust or other equity; Huling v. Abbott (1890) 86 Cal. 423, 25 Pac. 4, transferee with notice of the equity. But it does not apply to a *bona fide* volunteer who has parted with the property without notice of the equity. Bonesteel v. Bonesteel (1872) 30 Wis. 516; see *ante* § 301.

4. To hold that the equity reattaches in the hands of the wrongdoer or the holder with notice would not usually be a serious cutting down of the market for the property. In 7 Harv. Law Rev. 244 it is suggested that the subsequent transferees with notice are protected on their own merit, and not on that of the *bona fide* purchaser, but this seems to beg the question as to the effect of a transfer to a *bona fide* purchaser.

5. But the tendency is to place more emphasis upon the good faith of the purchaser and less upon his acting reasonably. For example, the Uniform Sales Act provides that, "a thing is done in good faith within the meaning of this act when it is in fact done honestly, whether it be done negligently or not." Williston, Sales § 619. And see 12 Harv. Law Rev. 279 discussing First National Bank v. Broadway Bank, N. Y. L. J. Oct. 12, 1898.

6. Third National Bank v. Lange (1878) 51 Md. 138, Ames Trust Cas. 318 (note made payable to and indorsed to "N. W. Watkins, trustee;" this was sufficient to charge the purchaser with notice). See also 10 Harv. Law Rev. 66, discussing Suarez v. DeMontigny (1890) 37 N. Y. Supp. 503 which held that the purchaser was chargeable with knowledge of the contents of the instrument creating the trust.

It is generally held that a purchaser who accepts a quit claim deed cannot claim to be without notice;[7] and a purchaser who asks his vendor to do an act which amounts to a fraud on another has been held chargeable with notice thereof.[8]

II. By act of cestui.

§ 306. Successive assignments.—Dearle v. Hall.

If the *cestui* of realty conveys[1] by sale[2] or mortgage, his interest,[3] to X and then later fraudulently pur-

7. Hudman v. Henderson (1910) 58 Tex. Civ. App., 358, 124 S. W. 186, discussed in 10 Col. Law Rev. 371. The rule seems unjust where a quit claim deed is the usual method of passing title.

8. In Eyre v. Burmester (1862) 10 H. of L. 90, Ames Trust Cas. 306. Sadleir made a mortgage to Eyre; later he conveyed the same to the L. & C. Bank to secure past and future advances. Before this was registered the bank learned of the first mortgage and refused to go ahead with the arrangement unless Sadleir should obtain a release from Eyre; Sadleir obtained the release by fraud. The court held that "the respondents left Sadleir to obtain the reconveyance, and they can claim the benefit of it only under Sadleir, whose act they must take as it is." See 17 Harv. Law Rev. 352 criticizing the somewhat similar case of Seacoast R. Co. v. Wood (1903) 65 N. J. Eq. 530, 56 Atl. 337.

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1. A form of conveyance which would be effective in passing the legal title to property will pass the *cestui's* equitable interest thereto if executed by the *cestui*. On this point equity, seeing no occasion for a different rule, followed the law; Carpenter v. Carpenter (1686) 1 Vernon 440, Ames Trust Cas. 322 (conveyance by fine or common recovery). As a rule, transfers of trust interests in land are required by statute to be in writing.

2. Where the *cestui* of land granted an annuity to A and then assigned his entire interest to B, A was protected tho B paid value in good faith; Phillips v. Phillips (1861) 4 DeG., F. & J. 208, Ames Trust Cas. 331. See *ante* § 304, note 5.

3. If by the instrument creating the trust the trustee is given absolute discretion to apply the income toward the maintenance of A, an attempted assignment by A has apparently the effect merely that the trustee must account to the assignee for any payments made to A after notice of the assignment; *In re* Coleman (1888) 39 Ch. D. 443, Ames Trust Cas. 339.

ports to convey, by sale or mortgage, his interest in the same property to Y, X will be protected everywhere against Y upon the ground that his equity is prior to that of Y.[4] But when the trust property involved is personalty, there is square conflict of authority. The prevailing view in this country protects the prior assignee regardless of any question of notice,[5] just as in case of equitable interests in realty. In England[6] and some states in this country[7] Y is protected as against X if he took his assignment without notice of the previous assignment to X and notified the trustee thereof before the latter learned of the prior assignment. The rule seems particulary objectionable where Y made no inquiry of the trustee to find out whether there had been a previous assignment by the *cestui*,[8] because in such a case he could not possibly be misled by X's failure to notify the trustee.[9] For this reason an inter-

4. Lee v. Howlett (1856) 2 Kay & J. 531, Ames Trust Cas. 329.

5. Putnam v. Story (1882) 132 Mass. 205. If the *cestui's* substantive interest be regarded as *in rem* and not merely *in personam*, such a decision would necessarily follow; see *ante* § 280. But the rule of the court administering the fund should prevail and not the law of the forum; see 19 Harv. Law Rev. 61.

6. The leading case is Dearle v. Hall (1828) 3 Russell 48, Ames Trust Cas. 323.

7. Jenkinson v. N. Y. Finance Co. (1911) 79 N. J. Eq. 247, 82 Atl. 36, 25 Harv. Law Rev. 728; 12 Col. Law Rev. 379.

8. In England apparently nothing turns upon whether Y made any inquiries; Foster v. Cockerell (1836) 3 Cl. & F. 456. And in Low v. Bouverie (1891) 3 Ch. 82 it was held that the trustee need not answer inquiries if they were made. In *In re* Wadsdale (1899) 1 Ch. 163 where between assignments the trustees were changed, a notification of the new trustees was held ineffectual to cut off the prior assignee; see 12 Harv. Law Rev. 572. But see *In re* Dallas (1903) 48 Sol. J. & R. 260, where priority of notice governed tho at the time of the first assignment there was no one to notify; see 17 Harv. Law Rev. 497. On the other hand, it is sufficient notice if the trustee finds out about the first assignment accidentally; Lloyd v. Banks (1868) 3 Ch. App. 488; see 9 Harv. Law Rev. 281.

9. A plausible explanation of Dearle v. Hall, *supra*, is that at the time of that decision, the English law was that if a seller of a chattel retained possession of it and later resold it, the second

mediate view has been suggested,[10] namely, that Y should be protected only where he has made such inquiry; but there still remains the difficulty that there seems to be no satisfactory ground[11] for a non-statutory[12] duty upon X toward Y to notify the trustee.[13]

In any jurisdiction, if the second assignment by the *cestui* be made to the trustee, the latter should be protected if *bona fide,* because he has the legal title and as good an equity as the prior assignee.[14] The only difference between this and the ordinary case of *bona fide* purchase for value without notice is that the trustee already has the legal title. Upon similar reasoning, if

purchaser, if he was *bona fide* and took possession, was preferred to the first; Edwards v. Harben (1788) 2 T. R. 587. If the first assignee from the *cestui* does not notify the trustee the *cestui* is somewhat in the position of being left in possession of the property and hence a second assignee who got something like possession by notifying the trustee, was protected if *bona fide.* The English rule as to retention of possession of chattels was later changed, but Dearle v. Hall was not; see 25 Harv. Law Rev. 728.

10. In Dearle v. Hall such inquiry was made by the later assignee, but the English cases later decided that it was not necessary.

11. See 7 Harv. Law Rev. 306 arguing that the first assignee is not bound to anticipate and guard against the rascality of his assignor; but see 9 Harv. Law Rev. 281.

12. Such a duty is imposed by the registry statutes which require the recording of deeds and mortgages in order to be effectual against later *bona fide* purchasers and judgment creditors; see 7 Harv. Law Rev. 305.

13. Where the holder of a legal chose in action makes successive assignments there is the same conflict of authority as to whether priority of assignment should prevail; see 7 Harv. Law Rev. 184, discussing Meier v. Hess (1893) 23 Ore. 599, 32 Pac. 755. See also 9 Harv. Law Rev. 153, 356; 11 Col. Law Rev. 81.

14. Newman v. Newman (1885) 25 Ch. D. 674, Ames Trust Cas. 335; "Trustees who have got a legal estate, or an estate of any kind, either money or land, may lend money to the *cestui que trust* and get a beneficial interest in the trust property, if they have no notice that there have been any prior incumbrances. They have got the legal estate and they have got the legal right; they have, therefore, got in respect to the charge created in their favor, before they have got notice of anything else their right to retain that which the law has given them."

the second assignee had not merely notified the trustee of the assignment but had in good faith procured from him the assignment of the legal title, he should everywhere be protected as against the prior assignee, because he has an equal equity and the legal title.[15]

III. By death.

§ 307. Death of the trustee.

Upon the death of a sole trustee leaving heirs, the legal title to real estate—apart from statute—passes to such heirs, but since they pay nothing for it, they take it subject to the trust.[1] If the trust property consists of personalty, it passes to the executor or administrator who likewise takes subject to the trust.[2] If one of

15. For a similar holding with respect to the assignment of a legal chose in action see *In re* Weiniger's Policy (1910) 2 Ch. 291; 24 Harv. Law Rev. 243. The same reasoning should apply where the second assignee of a legal chose in action makes a novation with the obligor; N. Y. Co. v. Schuyler (1865) 34 N. Y. 30, 80; or gets payment from the obligor of a judgment against him; Judson v. Corcoran (1855) 17 How. 612; or obtains the document containing the obligation when the latter is in the form of a specialty; Bridge v. Conn. Co. (1890) 152 Mass. 343, 25 N. E. 612. See Ames Trust Cas. 328 note.

1. Schenck v. Schenck (1863) 16 N. J. Eq. 174. The *cestui's* remedy was at first confined to the express trustee and the heir was not bound; Anonymous (1468) Y. B. 8 Edw. IV., fol. 6, pl. 1, Ames Trust Cas. 345; Weston v. Danvers (1584) Tothill, 105, Ames Trust Cas. 346. The heir of a lessee *pur autre vie* who enters as special occupant for the remainder of the lease also takes subject to a trust or other equity; see Stephens v. Bailey (1665) Nelson 106. And see *ante* § 109, for a discussion of the devolution of the rights and obligations of a vendor.

2. Schenck v. Schenck *supra*, In some jurisdictions, by statute, trust land does not descend to the trustee's heirs but to the personal representative; English Conveyancing and Law of Property Act, 1881, § 30, referred to in *Re* Pilling's Trusts, (1884) 20 Ch. D. 432. In others the statute directs that the title shall vest in the court; Collier v. Blake (1875) 14 Kas. 250. See also Boston Co. v. Condit (1869) 19 N. J. Eq. 394 (title of trust property goes to eldest son). The purpose of these statutes is to avoid the inconvenience which occurs where there are several heirs living in different jurisdictions.

several co-trustees dies his title survives to the others,[3] the statutes abolishing the rule as to survivorship applying only to property held beneficially.[4]

Where the trustee of personalty or allodial realty dies without heirs or next of kin[5] the title of the property goes to the State. But since the State is a volunteer it takes subject to the trust in the same way as does a private individual, the remedy being ordinarily by petition, however, rather than by subpœna.[6] But if the trust property is held in feudal tenure, the State takes as reversioner free from the trust because the grant to the trustee and his heirs having terminated for want of heirs,[7] the *cestui's* interest which is dependent for existence upon the trustee's title, also terminates.[8] In some jurisdictions, however, the *cestui's* rights have been preserved by statute against the accident of the trustee dying without heirs.[9]

§ 308. Death of the cestui.

If the *cestui* of property dies leaving heirs or next of kin, his equitable interest descends just as the legal

3. Stewart v. Pettus (1847) 10 Mo. 346.

4. Since the trustee as such has no beneficial interest, no injustice occurs in permitting the title to go to the co-trustees and it is obviously a more convenient rule.

5. Either without heirs in fact or because of civil death imposed as penalty for a felony.

6. In Hix v. Att'y Gen'l (1661) Hardres 176, Ames Trust Cas. 348, the trustee of a bond committed suicide and became civilly dead without heirs; the *cestui's* interest was protected, a special statute (33 Henry VIII. c. 39) providing for a remedy against the crown.

7. The King v. Mildmay (1833) 5 B. & A. 254: "The lord must always have such a tenant upon his lands as may be sufficient to answer all demands, and capable of commiting forfeiture."

8. It is just as if A, who has an estate for life with a reversion to B, should make a lease to X for ten years and then die at the end of two years; X's estate would come to an end because it could not last longer than A's estate, from which it was derived.

9. See 13 & 14 Vict. c. 60, §§ 15, 46.

title would have descended if he had had it.[1] Equity follows the law here because there was no occassion for a different rule.[2]

If the *cestui* of personalty or allodial realty dies without heirs or next of kin the equitable interest will go to the State[3] which is entitled to enforce the trust against the trustee. In case of feudal land it was formerly the English rule that the trustee would be entitled to keep the property because there was no one to take it away from him.[4] The *cestui's* interest did not escheat to the overlord because the *cestui* was never a part of the feudal system, which regarded only the legal title.[5] In England, by statute,[6] equitable interests in land now escheat to the state. In the United States the same result has been reached by judicial decisions which have applied the rule of *bona vacantia* to all kinds of property.[7]

1. Anonymous (1465) Y. B. 5 Ed. IV. fol. 7, pl. 16, Ames Trust Cas. 351. See *ante* § 108, devolution of purchaser's rights and obligations. Bartlett v. Bartlett (1883) 137 Mass. 156 (personalty).

2. Altho it was largely the influence of equitable principles which led to the statutory rules against survivorship, the doctrine was held applicable to joint tenants whose interests were merely equitable; Rex v. Williams (1735) Bunbury 342, Ames Trust Cas. 352.

3. Middleton v. Spicer (1783) 1 Brown, Ch. Cas. 201, Ames Trust Cas. 364; (the express trust was void because in violation of the Death Bed Gift Act; there being no next of kin, the Crown took.) This is upon the ground that since it has no other owner, it should go to the whole community. The doctrine is called *bona vacantia*, (goods without an owner) because it was first applied to chattels. See 14 Harv. Law Rev. 549. See also King v. Daccombe (1618) Croke's James 512, Ames Trust Cas. 353.

4. Burgess v. Wheate (1759) 1 Wm. Blackstone 123, Ames Trust Cas. 356. See also King's Att'y v. Sands (1669) Freeman, Ch. Cas. 129, Ames Trust Cas. 354.

5. "If the lord have a tenant to perform the services, the land cannot revert in demesne;" Burgess v. Wheate, *supra*.

6. See 47 & 48 Vict. c. 71, § 4.

7. Johnston v. Spicer (1887) 107 N. Y. 185, 13 N. E. 753. See 4 Law Quar. Rev. 330-336. Where the Crown seizes property under a statute which subjects to forfeiture the property of one convicted of treason, the doctrine of escheat is not involved and

III. By disseisin or conversion.

§ 309. Remedy of cestui against disseisor or converter.

If D disseises the trustee of trust land or converts trust chattels, D cannot be held as constructive trustee of such property because he does not claim in privity with the trustee but adversely to him and is therefore entitled to have the question settled in a common law court.[1] If the trustee refuses to bring ejectment to regain possession of the trust land or trover for the chattels, the *cestui* may maintain a bill in equity against the trustee for breach of trust in thus refusing; if D happens to be in the same jurisdiction, he may be joined as co-defendant in the equity suit in order to avoid a multiplicity of suits;[2] if D is not in the same jurisdiction, the court will compel the trustee to assign his claim[3] to the *cestui* who may then bring the appropriate common law action against D in the trustee's name.[4]

the Crown takes subject to equities; Pawlett v. Att'y Gen'l (1667) Hardres 465, Ames Trust Cas. 367.

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1. Lord Compton's Case (1580) 4 Leonard 196, Ames Trust Cas. 370; Earl of Worcester v. Finch (1600) Fourth Institute 85, Ames Trust Cas. 370: " . . . The disseisor was subject to no trust, nor any subpoena was maintainable against him, not only because he was in the *post*, but because the right of inheritence of freehold was determinable at the common law and not in the chancery."

2. Most courts will not decide questions of title to realty but will direct an issue to be tried at law. In code states this is comparatively simple, since it merely means transferring the case temporarily to the jury docket.

3. If the trustee's action is barred by the Statute of Limitations, the *cestui* is also barred even tho under disability, unless the *in rem* theory of the *cestui's* interest is applied. See *ante* § 280.

4. If the disseisor or convertor should sell the property the better view imposes a constructive trust upon the proceeds; see *ante* § 296.

the husband became owner of all the wife's chattels and received the right to collect all her choses in action as her attorney or representative.[2] If he should fail to collect the choses in action or otherwise reduce them to possession during the coverture, his power of attorney to collect was revoked by the termination of the coverture and the choses in action therefore would not become a part of his estate. If the right of a *cestui* be regarded as merely a chose in action against the trustee, then in order to make trust chattels a part of his estate the husband of the *cestui* would need to get a conveyance of the legal title from the trustee. Such was the early holding;[3] but it was later overruled[4] on the ground that equity should follow the law and hold the same as to the equitable interest in chattels as the law would hold if the wife had had the legal title to the chattels.[5]

If part of the trust estate consists of legal choses in action they must be collected or otherwise reduced to possession by the trustee before the husband's right to them will be perfected.[6]

Where personal property is conveyed upon trust for the separate use of a married woman free from the control of her husband, this will obviously prevent her then or intended husband from getting title to any of the property. Whether such a provision will also apply to subsequent marriages, there is conflict of authority.[7]

modified by legislation during the last half century; Tiffany, Real Property § 178.

2. Title to the choses in action did not pass because a chose in action is in its nature not completely assignable without the consent of the obligor. See *ante* § 261.

3. Witham's Case (1590) Fourth Institute 87, Ames Trust Cas. 385.

4. *Re* Bellamy (1883) 25 Ch. D. 620.

5. This change shows a tendency of the *cestui's* interest to become a right *in rem;* see *ante* § 280.

6. Elwin v. Williams (1843) 13 Simons 309, Ames Trust Cas. 386.

7. That it will not, see Miller v. Bingham (1841) 1 Ired. Eq. 423, Ames Trust Cas. 389; that it will, see Hawkes v. Hubback (1870) 11 Eq. 5.

V. By bankruptcy.

§ 313. Bankruptcy of the trustee.

Where a trustee becomes bankrupt the title of the trust property is usually held—as a matter of construction of the bankruptcy statutes—not to pass to the assignee in bankruptcy,[1] unless the trustee had some beneficial interest therein; for example, if he had a lien for advances or was one of several *cestuis.* In any event if the assignee does get title he takes it subject to the *cestui's* equity;[2] similarly, an assignee under a general assignment for the benefit of creditors takes subject to equities.[3]

§ 314. Bankruptcy of the cestui—"spendthrift" trusts.

It has been the policy of the common law that property should be freely alienable[1] either by the act of the owner or of his creditors; hence any provision by the grantor of property that the grantee of the legal title shall not alien[2] it or that it shall be free from

1. Carpenter v. Marnell (1802) 3 Bosanquet & Puller 40; *Ex parte* Chion (1721) 3 P. Wms. 187 note (A), Ames Trust Cas. 392.

2. Stewart v. Platt (1873) 101 U. S. 731. He also takes subject to any other equities or liens, being entitled only to that which belonged beneficially to the bankrupt; Yeatman v. Savings Inst'n (1877) 95 U. S. 764 (lien of pledgee). An assignee in bankruptcy represents ordinary creditors and since an ordinary creditor is not a *bona fide* purchaser for value—see *ante* § 301—neither is an assignee in bankruptcy.

3. Chace v. Chapin (1881) 130 Mass. 128.

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1. Probably the chief reason was the commercial instinct of the Anglo-Saxon;—it was considered undesirable to withdraw property from the market; see 7 Col. Law Rev. 592. The reason given by Professor Gray is that it is against public policy that a man should have an estate to live on, but not an estate to pay his debts with and that he should have the benefit of wealth without its responsibility; Gray, Restraints on Alienation § 258.

2. As to how far a grantor may forbid alienation to particular persons, there seems to be no settled rule; Gray, Restraints on

the payment of his debts, is void.[3] On this point equity has followed the law where the *cestui's* interest is in fee.[4] Where the *cestui's* interest is only for life, there is a conflict of authority. In England[5] and in a minority of states in this country[6] the same rule is applied as in case of legal estates and of equitable estates in fee; but in perhaps the majority of jurisdictions in this country where the question has been raised, such a provision with reference to equitable life estates has been held valid.[7] The arguments in favor of such a decision are, briefly, that the creator of the trust ought to be allowed to do what he pleases with his own property,[8] and that it ought to be possible to

Alienation §§ 31-45; 24 Harv. Law Rev. 584. If the attempted restraint is unqualified as to persons the weight of authority holds it void, tho it is limited as to time; Potter v. Couch (1890) 141 U. S. 296, 315; *contra* Frazier v. Combs (1910) 140 Ky. 77, 130 S. W. 812; 24 Harv. Law Rev. 245.

3. There is no objection, however, to granting an estate to A for life or until he should attempt to alienate it or should become bankrupt, and then over to B; for in such a case as soon as he should attempt to convey or should become bankrupt, his life estate would come to an end, and the creditors or transferees of A would get nothing because there would be nothing left; Gray, Restraints on Alienation § 78.

4. Gray, Restraints on Alienation § 105. It is true that equity upheld provisions which prevented the alienation of equitable fees for the separate use of married women; but in such a case the only power to alien which the married woman had was given by equity courts because such separate estates were entirely the product of chancery; hence there could be no objection to equity upholding a provison taking away the power of transfer; Gray, Restraints on Alienation § 275. Whether such a provision is valid in a conveyance made by the married woman herself see Gray, Restraints on Alienation § 277a; 12 Harv. Law Rev. 53.

5. Brandon v. Robinson (1811) 18 Vesey 429, Ames Trust Cas. 394.

6. Gray, Restraints on Alienation § 178; Tillinghast v. Bradford (1858) 5 R. I. 205.

7. Broadway Bank v. Adams (1882) 133 Mass. 170.

8. Broadway Bank v. Adams, *supra*: "The founder of the trust was the absolute owner of his property. He had the entire right to dispose of it, either by an absolute gift to his brother, or by a gift

protect spendthrifts—i. e. persons who, tho sane, are incompetent to take care of their property— in much the same way as it is possible to protect married women and infants.[9] In some jurisdictions the matter is now regulated by statute, limiting the amount of property that may thus be placed beyond the reach of creditors to a reasonable provision for their education and support.[10] In no jurisdiction may the owner of property make such a settlement upon himself.[11]

Where the trust instrument provides that the trustee shall have an uncontrolled discretion in applying the income for the maintenance of the life *cestui,* the latter has no present vested interest in the property and there is nothing which the creditors can reach.[12]

VI. By act of creditors.

§ 315. Creditors of the trustee.

Since the trustee has the legal title to the trust

with such restrictions and limitations, not repugnant to law, as he saw fit to impose . . . The power of alienation in advance is not a necessary attribute or incident of such an estate or interest, so that the restraint of such alienation would introduce repugnant or inconsistent elements." For an answer to this, see Gray, Restraints on Alienation §§ 257, 259: "If equitable estates are to be distinguished from legal estates, why confine the difference to equitable life estates? A testator may give such rights of property as he pleases, provided they are rights which the law sanctions; but inalienable rights of property the law has never sanctioned, for they are inconsistent with the ready transfer of property which is essential to the well being of a civilized community, and especially of a commercial republic." See 11 Col. Law Rev. 765, 766.

9. See 11 Col. Law Rev. 767.

10. Gray, Restraints on Alienation §§ 280-296.

11. Gray, Restraints on Alienation §§ 90-100, 23 Harv. Law Rev. 649. Nor may he settle the property upon himself until bankruptcy and then over; Gray, Restraints on Alienation §§ 91-96.

12. *In re* Bullock (1891) L. J. R. 341, Ames Trust Cas. 401; Gray, Restraints on Alienation § 167, 167f. As to the rights of the assignee of such a *cestui,* see *ante* § 100, Gray, Restraints on Alienation § 167j. See also 6 Col. Law Rev. 348, 368.

property, it is liable at common law for all his debts,[1] whether incurred in the management of the trust property[2] or not, and the creditors may levy thereon and have it sold on execution. But unless the trustee has some beneficial interest in the property equity will usually,[3] at the suit of the *cestui*,[4] enjoin the creditors[5] from levying thereon. If no injunction is asked and the property is sold to a *bona fide* purchaser for value at the execution sale,[6] the *cestui's* equity is of course cut off.[7]

If the creditors' claim against the trustee is for property or services of which the trust estate has received the benefit, and the trustee is non-resident or insolvent, it is clear that there should be some way of making the trust property liable. There are two possible plans upon either of which the creditors should be allowed to proceed: (1) He should be allowed to levy upon the trust property and then defeat the *cestui's* suit for an injunction by showing that the trust estate has received the benefit of the creditor's property or services and that therefore the *cestui* is not justly en-

1. Stith v. Lookabill (1874) 71 N. C. 25, Ames Trust Cas. 406. But see Baker v. Copenbarger (1853) 15 Ill. 103.

2. That the burdens incident to the management of the trust estate fall upon the trustee, see § 279.

3. The reason for this modification is given *infra*.

4. If the *cestui* does not object, no one else can; Stith v. Lookabill, *supra*.

5. A creditor is not a *bona fide* purchaser for value because he does not get title and pays no value; Whitworth v. Gaugain (1844) 3 Hare 416, Ames Trust Cas. 408; see *ante* § 301.

6. According to the better view a judgment creditor who buys at the sale is as much entitled to the protection of the doctrine of *bona fide* purchase for value as is a stranger; see *ante* § 301; and see 7 Harv. Law Rev. 125.

7. If a debtor assigns his property in trust to pay debts the creditors are *cestuis* of this trust and may enforce it by what is usually called a creditor's bill; see *post* § 455. In England, however, such a transfer is treated as being merely for the convenience of the debtor and the creditors are not entitled to proceed in equity; see Worrall v. Harford (1802) 8 Ves. 4, Ames Trust Cas. 415.

titled to the injunction. (2) He should be allowed to reach, by equitable execution, the claim which the trustee has for exoneration against having to pay out of his own pocket the expenses properly incurred in the management of the trust estate.[8] The chief advantage of (1) is that the creditor would not take subject to claims in favor of the trust estate against the trustee.[9] Another advantage is that it throws upon the *cestui* the burden of initiating the equity proceeding. In England no recovery is allowed to a creditor against the trust estate unless the trust is one to carry on a trade, expressly provided for in the trust instrument.[10]

§ 316. Creditors of the cestui.

Since the *cestui's* interest from the standpoint of procedure was only a chose in action against the trustee,[1] it could not be reached by an ordinary common law levy any more than could a legal chose in action;[2] apart from statute a sheriff could sell only tangible property, possession of which could be delivered over to

8. This was the basis for allowing recovery in Norton v. Phelps (1877) 54 Miss. 567; Ames Trust Cas. 420; 15 Am. Law Rev. 449.

9. In Manderson's Appeal (1886) 113 Pa. 631, 6 Atl. 893, the creditor was allowed to recover tho the trustee was a defaulter to the trust estate. In *In re* Johnson (1850) 15 Ch. D. 548, Ames Trust Cas. 426 the creditor was barred because the trustee was in default. For a very thorough discussion of the whole subject see 28 Harv. Law Rev. 725-741, Liabilities in the Administration of Trusts, by Austin W. Scott. See also 2 Col. Law Rev. 344.

10. Upon this basis, recovery was allowed in Fairland v. Percy (1875) 3 Prob. & Div. 217, Ames Trust Cas. 423; but denied in Strickland v. Symons (1884) 26 Ch. D. 245, Ames Trust Cas. 418.

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1. See *ante* § 280.

2. Scott v. Scholey (1807) 8 East 467, Ames Trust Cas. 441 (equitable interest in term for years). In Dundas v. Dutens (1790) 2 Ball & Beatty 233, Ames Trust Cas. 443 the creditor sought by equitable execution to reach shares of stock held in trust for the benefit of his debtor. Relief was denied because at that time the stock itself was not subject to either common law or equitable execution. In practically all jurisdictions shares may now be reached by

the purchaser.[3] To remedy this defect in common law procedure equity allows a creditor who can not get satisfaction through common law execution[4] to file a bill against his debtor asking that enough of the latter's intangible property be assigned to the plaintiff to pay the plaintiff's claim; the creditor can then collect the chose in action as the assignee of the debtor. If the obligor of the chose in action sought to be reached happens to be within the jurisdiction of the court, he may be joined as a co-defendant and then settle the whole matter in the one equity suit. Such a bill is called a creditor's bill for equitable execution[5] and enables a creditor to reach both legal and equitable choses in action. Hence if a creditor of a *cestui* is unable to get complete satisfaction at law out of tangible property of the *cestui,* he may file a bill in equity asking that the *cestui's* trust interest be subjected to the payment of his claim. By statute in some jurisdictions equitable interests in land have been subjected to common law execution.[6] Where the statute does not apply, however, the creditor may still fall back upon his equitable remedy.[7]

At common law creditors who levied upon the property of an insolvent debtor were entitled to preference according to the time of their respective levies; it was a race of diligence.[8] Equity here follows the law with respect to creditors' attempting to reach

creditors and the fact that they are held in trust makes only the difference that a double assignment may be necessary: of the *cestui's* claim against the trustee and of the trustee's claim (shares) against the corporation.

3. A patent right is another example of intangible property not subject to common law execution. See 23 Harv. Law Rev. 150.

4. The creditor must either show that his judgment at law was returned unsatisfied or that it was obviously futile to get a judgment or levy execution.

5. See *post* § 455.

6. See Statute 29 Chas. II, Chap. 3. §§ 10 & 11.

7. Kirkby v. Dillon (1824) Cooper 504, Ames Trust Cas. 439.

8. Rockhill v. Hanna (1853) 15 How. 189.

the debtor's equitable interest by giving preference according to the time of filing their respective bills in equity[9] for equitable execution.[10]

Where a valid spendthrift trust has been created or a trust for the separate use of a married woman, the creditors cannot get equitable execution against such interests.[11]

G. Extinguishment of a Trust.

§ 317. Methods of extinguishment.

A trust may be completely extinguished in any one of four ways:

(1) By revocation, where by the terms of the creation of the trust a power to revoke has been reserved.[1] In the absence of such a reservation the

9. Freedman's Co. v. Earle (1883) 110 U. S. 710, Ames Trust Cas. 436. In England, tho real estate was not subject to the payment of debts one could bind his land by giving a bond naming his heir; in such case the heir was bound to the extent of the value of property received from the ancestor. Equity here also followed the law by allowing the ancestor to bind equitable interests in land by such a bond; see Lord Grey v. Colville (1678) 2 Rep. in Chancery 143, Ames Trust Cas. 433; Bennett v. Box (1603) 1 Ch. Cas. 12.

10. Where a decedent who owned property which was not at law subject to the payment of his debts, directed in his will that such property be applied to the payment of his debts, the maxim that equality was equity was applied so as to make all the creditors share ratably without priorities. Since the right of such creditors existed only in equity, such assets were called "equitable assets," without regard to whether the property involved was legal or equitable property. On the other hand, property which was subject to the payment of debts at common law were called "legal assets" even tho the interests were equitable, such as a trust or equity of redemption; see Creditors of Sir Charles Cox (1734) 3 Peere Wms. 341, Ames Trust Cas. 438, overruled by Sharpe v. Scarborough (1799) 4 Ves. 538. In this country land is everywhere made subject to the payment of debts by statute so that the distinction between legal and equitable assets is of no consequence.

11. See *ante* § 314.

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1. Dickerson's Appeal (1886) 115 Pa. 198, 8 Atl. 64.

creator of the trust cannot, ordinarily,[2] put an end to the trust[3] unless he can show fraud or mistake.[4] In several jurisdictions if the creator of the trust received no consideration there is a presumption[5] that the reservation of a power of revocation was omitted by mistake.

(2) By merger of the equitable interest into the legal title. This may happen: (a) by transfer of the legal title from the trustee to the *cestui;* (b) by release of the equitable interest by the *cestui* or *cestuis*[6]—if *sui juris*—to the trustee; (c) by the *cestui* inheriting the legal title from the trustee[7] or by the trustee inheriting the equitable interest from the *cestui.*

(3) In some jurisdictions, by statute, where the purposes of the trust have been accomplished and the trust becomes a dry or passive trust, the title of the

2. In New York and Massachusetts, however, and perhaps a few other states, a deposit of money in a savings bank by A in trust for B is revocable by A during his life time. This anomalous doctrine was based upon the fact that many such deposits were made merely in order to evade some rule of the bank and not to benefit B. For a discussion of these "tentative trusts" see 9 Col. Law Rev. 70, 77; 6 *id.* 57; 11 *id.* 692; 13 Harv. Law Rev. 63; 18 *id.* 70.

3. Gray v. Union Trust Co. (1915) 171 Cal. 637, 154 Pac. 306, discussed in 4 Cal. Law Rev. 354-356; N. J. Trust Co. v. Parker (1915) 84 N. J. Eq. 351, 93 Atl. 196. Of course if the creator of the trust becomes the sole *cestui* he may put an end to the trust by getting a conveyance from the trustee.

4. As to equitable relief against fraud and mistake, see *post* Ch. VI and VII.

5. See Garnsey v. Mundy (1873) 24 N. J. Eq. 243; 10 Harv. Law Rev. 443; 63 U. of Pa. Law Rev. 816. But see Keyes v. Carleton (1886) 141 Mass. 45, 6 N. E. 524.

6. No merger results merely because the trustee is one of several *cestuis*: Rankine v. Metzger (1902) 69 N. Y. App. Div. 264; or merely because the *cestui* is one of several trustees; Robertson v. De Brulatos (1907) 188 N. Y. 301. See 10 Col. Law Rev. 488. Nor is there any merger of any part of an equitable fee into a legal life estate or of an equitable life estate into a legal fee; *In re* Moore's Estate (1901) 198 Pa. St. 611, 48 Atl. 884; 29 Harv. Law Rev. 345.

7. In Goodright v. Wells (1780) 2 Douglas 771, Ames Trust Cas. 447, S had contracted to buy some land and had paid for it but died before a conveyance, having devised it to his wife in trust for his son. After S's death the widow received the conveyance and died

trustee is passed by operation of law to the *cestui*.[8]

(4) By accidental destruction of the entire trust property.

If the trustee is responsible for the destruction or dissipation of the trust property there is not a complete extinguishment of the trust[9] because the obligation of the trustee still remains. On the other hand, putting an end to the obligation of the trustee[10] is not an extinguishment of the trust as long as the trust property remains.

H. Duties of a Trustee.

I. As to conveyance of the trust property.

§ 318. The general rule.

If the *cestui* is *sui juris* the trustee must ordinarily convey the trust estate at his direction[1]—either to the

leaving the son as her heir. At the death of the son without issue the question was raised as to whether his paternal or maternal heirs were entitled. The latter were successful, because altho the son had received the equitable interest as purchaser—i. e. not by descent—from the father, he received the legal title by descent from the mother and the equitable interest was at once merged in the legal title; the last purchaser of the legal title being the mother, the maternal heirs were entitled.

8. This amounts substantially to a reenactment of the Statute of Uses, but with reference to passive trusts.

9. In such a case the *cestui* will ordinarily be compelled to come in as an ordinary claimant against the trustee's estate if the latter is insolvent. See *ante* § 297.

10. For sufficient cause, such as illness or removal from the jurisdiction or by consent of parties, a trustee may be relieved from the performance of his trust duties; even tho no trustee was appointed by the creator of the trust, the trust comes into existence, the appropriate court of equity appointing trustees to carry out the trust.

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1. If he wrongfully refuses and the *cestui* is compelled to sue for a conveyance, the trustee will be liable for the costs of the suit; Watts v. Turner (1830) 1 Russell & Mylne 634, Ames Trust Cas. 453. If the trustee was doubtful about his duty to convey he should have

cestui himself[2] or to a third party. If there are several *cestuis,* however, they must all concur in order to be entitled to a conveyance; the trustee is not bound to convey less than the entire property.[3] If some of the *cestuis* have conveyed their trust interests in trust for another of the *cestuis,* it is apparently not necessary that such sub-trustee be joined in a suit by the *cestuis* against the trustee holding the legal title.[4]

Where the instrument creating the trust directs the trustee to convert the money into land or the land into money, the *cestui* or *cestuis,* if *sui juris* may object to the proposed conversion and compel the trustee to convey the property in its original form.[5] This is called the doctrine of equitable reconversion.[6]

Where the donee of a power to appoint the trust interest in property appoints such property to trustees for the ultimate beneficiaries, the question arises as to which set of trustees is entitled to the title and control of the property. There seems to be no fixed rule on the

applied to the proper equity court for instructions; see 8 Col. Law Rev. 671.

2. In Onslow v. Wallis (1849) 1 Hall & Twell 513, Ames Trust Cas. 462, S had conveyed certain land to the defendant in trust for Louisa S; the latter died, having devised all her lands to the plaintiffs upon trust to sell and pay certain debts and legacies given by her in a certain memorandum marked "A." This memorandum could not be found. It was held that the plaintiffs were entitled to hold the residue beneficially, if the memorandum should never be found. See *ante* § 308.

3. In Goodson v. Ellison (1827) 3 Russel 583, Ames Trust Cas. 451, the defendant was trustee for eight *cestuis,* one of whom transferred his interest to the plaintiff who asked for a conveyance of the legal title to one eighth of the property. The court refused, saying: "Has not a trustee a right to say 'If you mean to divest me of my trust, divest me of it altogether and then make your conveyances as you think proper'?" See also Russell v. Grinnell (1870) 105 Mass 425: an equitable life tenant is not entitled to conveyance of legal life estate.

4. Head v. Lord Teynham (1783) 1 Cox 57, Ames Trust Cas. 170.

5. *Re* Browne's Will (1859) 27 Beav. 324, Ames Trust Cas. 455.

6. See *post* § 449.

subject, but the extent of the power is probably an important element in guiding the court's discretion.[7]

§ 319. Provision postponing cestui's right to a conveyance.

Though ordinarily a sole *cestui* is entitled to a conveyance of the trust estate as soon as he becomes *sui juris*,[1] a provision in the trust instrument that the corpus of the estate shall not be transferred to the *cestui* till some time after reaching majority has been held valid in a few jurisdictions.[2] Altho the purpose of such a provision is similar to the purpose of creating a spendthrift trust—namely, to prevent persons of slight business ability from wasting the property[3]—it is to be noted that the mere postponement of control does not

7. In *Re* Philbrick's Settlement (1865) 34 L. J. Ch. 368, Ames Trust Cas. 459, where the court directed a conveyance to the new trustees, the donee had a general power of appointment by will; while in Busk v. Aldam (1874) 19 Eq. 16, Ames Trust Cas. 460 where the old trustees were left in control, the power was merely a special power to appoint among the donee's children.

1. See *ante* § 317.

2. The leading case holding such a provision valid is Claflin v. Claflin (1889) 149 Mass. 19, 20 N. E. 454, Ames Trust Cas. 455. Gray, Restraints on Alienation § 124, 124l. See also Wagner v. Wagner (1910) 244 Ill. 101, 91 N. E. 66; 5 Ill. Law Rev. 318. In England, however, and the great majority of American jurisdictions such a provision is held invalid; Saunders v. Vautier (1841) 4 Beav. 115, Ames Trust Cas. 454. See 24 Harv. Law Rev. 224.

3. In Claflin v. Claflin *supra*, the court refers to the fact that Massachusetts had already refused to follow the English courts by holding spendthrift trusts valid and continues: "And we are unable to see that the directions of the testator to the trustees to pay the money to the plaintiff when he reaches the age of twenty-five and thirty years, and not before, are against public policy, or are so far inconsistent with the rights of property given to the plaintiff that they should not be carried into effect. It cannot be said that these restrictions upon the plaintiff's possession and control of the property are altogether useless, for there is not the same danger that he will spend the property while it is in the hands of the trustees as there would be if it were in his own."

make the property inalienable.[4] It has been urged that there should be some limit to the length of time that such a postponement will be allowed to continue, but the point is not yet settled;[5] and the whole doctrine has been severely criticised,[6] upon much the same ground as are spendthrift trusts.[7]

II. As to possession, information and custody.

§ 320. Right of life cestui to possession.

The *cestui* for life has obviously no right to call upon the trustee of the fee for a conveyance of a legal life estate.[1] Nor has he any right to demand

4. Claflin v. Claflin *supra;* 24 Harv. Law Rev. 224. But see Boston Safe Deposit & Trust Co. v. Collier (1915) 222 Mass. 390, 111 N. E. 163, criticized in 29 Harv. Law Rev. 557. In that case the testator had devised property to trustees to pay the income to his son for life and thereafter to his son's children till the eldest should reach forty, at which time the property was to be divided equally among them. There was also a spendthrift trust provision. At the time of distribution one of the son's children had become bankrupt and his assignee claimed his share but was unsuccessful. See also Wagner v. Wagner (1910) 244 Ill. 101, 91 N. E. 66, for a combination of spendthrift trust with postponement of control; 5 Ill. Law Rev. 318.

5. See 19 Harv. Law Rev. 604, 20 *id.* 202, suggesting that it should be limited to twenty-one years after lives in being at the death of the testator.

6. Gray, Restraints on Alienation §§ 105-124. It has been pointed out that if a transferee or creditor of the *cestui* in Claflin v. Claflin takes free from the provision, it will be easy for the *cestui* to evade it by an assignment and reassignment; whereas if the creditor or transferee takes subject to the proviso, it will be difficult for the *cestui* to dispose of his interest at a fair value; 24 Harv. Law Rev. 225. On the other hand, Professor Ames has shown that it is comparatively easy in any jurisdiction for the creator of the trust to accomplish postponement of control by giving to the trustee or some third person in whom he has confidence, a small beneficial interest in the property; not being the sole *cestui* in such a case, there is no right to a conveyance; Ames Trust Cas. 455 note.

7. See *ante* § 314.

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1. See *ante* § 318. The holder of an equitable fee is entitled to demand possession of the land: Att'y Gen'l v. Gore (1740) 145, 150.

possession of the land unless it is clear from the trust instrument or from special circumstances[2] that the creator of the trust intended him to have possession.[3]

§ 321. Extent of duty to give information.

A trustee is under a duty to keep clear and accurate accounts of the trust property and to produce them for the inspection of the *cestui;*[1] he must also produce all deeds and documents relating to the trust property.[2] But where there are several *cestuis,* he is not bound to give to one *cestui* any information as to the shares of the others unless it is necessary to do so in giving information to the former.[3] If he procures opinions of counsel to guide him in the administration of the trust, he must produce them for the benefit of the *cestui.*[4]

§ 322. Duty of custody.

Like other fiduciaries a trustee, while he is properly performing the duties of his trust, is liable only for

2. For example, where the property in question was the family residence.

3. Tidd v. Lister (1820) 5 Maddock 429, Ames Trust Cas. 465. If mere personal occupation had been sought and not the management of the property, the decision might conceivably have been different. The rule of Tidd v. Lister has been changed in England by the Settled Land Acts, the effect of which has been to raise a presumption in favor of the equitable life tenant; West v. Wythes (1893) 2 Ch. 369, 374.

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1. Blauvelt v. Ackerman (1873) 23 N. J. Eq. 495 (commissions disallowed because accounts negligently kept).

2. Bugden v. Tylee (1856) 21 Beav. 515.

3. *In re* Tillott (1893) 1 Ch. 86, Ames Trust Cas. 468.

4. Wynne v. Humberston (1859) 27 Beav. 421. But not if they have been obtained for the purpose of defending himself against proceedings by the *cestui;* Brown v. Oakshoot (1849) 12 Beav. 252; but see *Re* Postlethwaite (1887) 35 Ch. D. 722, *aliter,* where fraud is charged against the trustee; Ames Trust Cas. 470 note.

due care[1] of the trust property; he is not liable as an insurer. Hence if the trust property is lost by robbery or theft,[2] or is destroyed, or depreciates while it is rightfully in his custody, he is not liable unless he was negligent.[3] Nor is he liable for such loss if he has rightfully placed the property in the hands of another.[4] It is frequently his duty not to keep personal charge of trust funds; it would not usually be due care for him to keep large sums of trust money at his residence. He should deposit the money in a reputable bank at his earliest opportunity and if he fails to do so he will be liable if the money is stolen or destroyed.[5]

By the weight of authority a public officer who has charge of public funds is liable not merely for the care of a prudent man but as an insurer[6] against everything

1. It is sometimes said that a trustee must keep as his own; Jones v. Lewis (1750) 2 Ves. 240, Ames Trust Cas. 502. The better view, especially now that trustees nearly everywhere receive compensation, is that the strandard of care should be an abstract, extrinsic one—that care which men of ordinary prudence use in their own affairs under similar circumstances; see Fahnestock's Appeal (1883) 104 Pa. St. 46.

2. Mosley v. Mosley (1678) 2 Cases in Ch. 2, Ames Trust Cas. 502 (theft of trust money by trustee's servant).

3. In *Ex parte* Ogle (1873) 8 Ch. App. 711, Ames Trust Cas. 504 the defendant, an assignee upon trust for creditors, allowed the debtor to remain in possession of some wine and brandy which the defendant should have taken and disposed of for the benefit of the creditors; while thus in the debtor's possession most of it was consumed; the trustee was held liable.

4. Jones v. Lewis (1750) 2 Ves. 240, Ames Trust Cas. 502 (goods stolen from the trustee's solicitor to whom the goods had been properly delivered). See also Field v. Field (1894) 1 Ch. 425, Ames Trust Cas. 505 (trustee in placing title deeds in hands of solicitor must act reasonably).

5. Cornwell v. Deck (1876) 8 Hun 122 (money kept in bedroom for nearly a year; nearest bank twelve miles away).

6. See 10 Harv. Law Rev. 126; 11 *id.* 271; 13 *id.* 415; 9 Col. Law Rev. 639. See also Mechem, Public Officers §§ 298-303, arguing against the exceptional liability. In most of the cases the loss was due to the unexpected failure of the bank in which the public funds were deposited. But in Smythe v. U. S. (1903) 188 U. S. 156 the

except perhaps an act of God or the public enemies.[7] The reason given for this heavy liability is usually the great public interest in preserving public funds.[8] The weight of authority also holds that he must account for the interest received on public funds, just as any private trustee must account for interest on private funds.[9]

III. As to investment, collection and payment.

§ 323. Standard of care—investments authorized by the creator of the trust.

Tho courts differ in their application of the standard of care of trustees in regard to investments, they are agreed that the standard should be such care as prudent men would exercise in the management of their own affairs, not with a view to speculation,[1] but

officer was held liable for the accidental destruction by fire of treasury notes even tho the plaintiff (the United States) could have avoided the loss by issuing new notes; see 16 Harv. Law Rev. 524; 3 Col. Law Rev. 354.

7. This modification is suggested in Tillinghast v. Merrill (1896) 151 N. Y. 135, 45 N. E. 375; drawing the analogy, of course, from the rule as to common carriers; see 10 Harv. Law Rev. 386.

8. In State v. Copeland (1896) 96 Tenn. 296, 34 S. W. 427 the court in holding the defendant liable only for due care was influenced by the countervailing public interest in not discouraging the better class of men from accepting public office when the liabilities are so onerous.

9. Adams v. Williams (1910) 97 Miss. 113, 52 So. 865; 10 Col. Law Rev. 677.

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1. A prudent man might speculate with a small portion of his own funds, especially if he has besides an ample amount for the support of himself and family and his earning capacity is large, but he has no right to treat trust funds in this way. It is therefore inaccurate to say that a trustee is bound to use only that care which he would use with his own—especially now that trustees practically everywhere receive compensation. Such a statement is inaccurate also because it does not mention the requirement of prudence. See *In re* Salmon (1889) 42 Ch. 351, Ames Trust Cas.

with a view to preserving[2] the *corpus* of the fund.[3]

If the creator of the trust directs the trustee to make or continue certain investments, the trustees will be justified in following such directions, even tho the investments would not—in the absence of such authorization—be allowed by courts of equity.[4] But where the testator gave full power to invest "in any security, real or personal, which they may deem for the benefit of my estate," it was held that while this authorized the trustees to make investments which a court of equity would not otherwise approve, it did not justify the trustees in investing in the stock of a manufacturing business.[5]

§ 324. Investments authorized by courts of equity.

At the present time investments in government securities or investments secured by first mortgage on real estate[1] are everywhere regarded as proper. In

487; Dickinson, Appellant (1890) 152 Mass. 184, Ames Trust Cas. 478; "A prudent man possessed of considerable wealth, in investing a small part of his property, may wisely enough take risks which a trustee would not be justified in taking."

2. It is sometimes said that the trustee's chief duty is to invest securely, and this is substantially true unless there is competition between an equitable life tenant and remainder-man; in such a case the duty of the trustee is to invest with a view to productivity in order to take care of the interests of the life tenant; see Kinmonth v. Brigham (1862) 87 Mass. 270, 278: "They are equally bound to preserve the capital of the fund for the benefit of the remainder-man, and to secure the usual rate of income upon safe investments for the tenant for life; and to use a sound discretion in reference to each of these objects."

3. Harvard College v. Amory (1830) 9 Pick. 446.

4. Arnould v. Grinstead (1872) Weekly Notes 216, Ames Trust Cas. 488.

5. Matter of Hall (1900) 164 N. Y. 196, 58 N. E. 11; 14 Harv. Law Rev. 392; 28 *id.* 216.

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1. Investments in real estate mortgages should have some margin in order to avoid loss through depreciation and expenses of foreclosure. There is, apparently, no hard and fast rule as to the

England, formerly, only government securities were allowed,[2] but by statute[3] first mortgages on real estate have been authorized. In England, New York[4] and perhaps the majority of states in this country these are practically the only investments authorized by equity courts.[5] But in Massachusetts[6] and a minority of jurisdictions there is no such limitation and a trustee may, in the exercise of a sound discretion, invest a part of the trust funds in the stocks and bonds of business corporations. But even in jurisdictions having this more liberal rule, there are certain investments which would not be approved; for example, unless authorized by the creator of the trust, loans on personal security only,[7] the purchase of land,[8] of chattels,[9] loans on a

amount of margin required. Roughly, a margin of one-third in case of agricultural land and a margin of one-half where the chief value lies in buildings, is required for safety; *In re* Salmon (1889) 42 Ch. 351, Ames Trust Cas. 487.

2. *Ex parte* Cathorpe (1785) 1 Cox. Eq. Cas. 182, Ames Trust Cas. 484.

3. 22 & 23 Vict. c. 35, § 32.

4. King v. Talbot (1869) 40 N. Y. 76, Ames Trust Cas. 472 (breach of trust to invest part of trust funds in railway stock).

5. In a few jurisdictions the matter is now regulated by statute. See Bowen v. Wright (1869) 39 Ga. 96; Ames Trust Cas. 486, note.

6. Dickinson, Appellant (1890) 152 Mass. 184, 25 N. E. 99, Ames Trust Cas. 478: "Trustees . . . are permitted to invest portions of trust funds in dividend-paying stocks and interest-bearing bonds of private corporations, when the corporations have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in such stocks and bonds as permanent investments." In the hands of a capable trustee the Massachusetts rule is better; but if the trustee is not thoroughly capable and prudent, the New York rule is preferable.

7. Holmes v. Dring (1788) 2 Cox Eq. Cas. 1, Ames Trust Cas. 471. But see Barney v. Parsons (1882) 54 Vt. 623.

8. Williams v. Williams (1882) 35 N. J. Eq. 100.

9. Campbell v. Miller (1868) 38 Ga. 304.

contributory[10] or participating mortgage,[11] loans on second mortgages,[12] loans on leasehold mortgages,[13] and investments where there is a large element of speculation.[14] Loans outside the state are generally disapproved in jurisdictions following the New York rule[15] but are sometimes allowed under the more liberal view.[16] If the property placed in trust by the creator of the trust is invested in unauthorized securities, the trustee should convert it, within a reasonable time, into authorized securities in the absence of any direction by the creator.[17]

10. The objection to a contributing mortgage is that the trustee does not have entire control and the rights of the *cestuis* are involved with those of strangers. Webb v. Jonas (1888) 39 Ch. D. 660.

11. A participating mortgage is one in which the trustee of several unrelated trusts combines them in one investment; the objection here is that there is danger of conflicting duties to the several *cestuis*. McCullough's Ex'rs v. McCullough (1888) 49 N. J. Eq. 313, 14 Atl. 642; 28 Harv. Law Rev. 335.

12. Gilmore v. Tuttle (1880) 32 N. J. Eq. 611.

13. Fyler v. Fyler (1841) 3 Beav. 551; unless the leaseholds are for a very long term at a low rental; Macleod v. Armesley (1853) 16 Beav. 600. See Trustee Act. 1893 c. 53 § 5; Ames Trust Cas. 485 note.

14. Dickinson, Appellant *supra*.

15. Unless there are special circumstances, such as the protection of other interests of the trust. Ormiston v. Olcott (1881) 84 N. Y. 339. The reason for the rule is the inability of the court or trustee to look after the trust *res* properly; see 4 Col. Law Rev. 444.

16. Thayer v. Dewey (1904) 185 Mass. 68, 69 N. E. 1074; 17 Harv. Law Rev. 578; 9 Col. Law Rev. 89.

17. Brown v. Gellatly (1867) 2 Ch. App. 751; Ames Trust Cas. 489. In other cases of changing investments the trustee should get an order of court unless the creator of the trust has authorized the change or unless there is an emergency; for example, where the investment has become insecure and an application to the court would make it still worse. On the subject of investments, see Loring's Handbook for Trustees.

§ 325. Depositing trust money in a bank.

If the trustee has trust money in his hands for which he cannot find a proper and desirable investment, he should deposit it in a reputable bank temporarily, in his name as trustee.[1] There is, of course, no objection to such a deposit drawing interest, but the deposit should not be for a fixed time because the trustee must be able at any time to get the fund for a permanent investment.[2] It is also a breach of trust if the fund is left in the bank for an unreasonable time and the trustee is liable for loss if the bank fails.[3]

If the deposit is made without adding after his name the word "trustee"[4] or in some other way indicating his fiduciary position, it is a breach of trust and he is liable for loss if the bank fails[5] and is perhaps liable also for interest from the time of such breach.[6] The reason for such a strict rule is that if the bank is not informed of his fiduciary obligation it will be justified in giving him personal credit on the security of such a deposit and thus become entitled to the rights of a *bona fide* mortgagee for value.[7]

1. In such a case he is not liable if the bank unexpectedly fails; Johnson v. Newton (1853) 11 Hare 160.

2. Baer's App. (1889) 127 Pa. 360, 18 Atl. 1.

3. Cann v. Cann (1884) 33 Weekly Rep. 40, Ames Trust Cas. 481 (money left in bank for fourteen months).

4. This does not make the deposit a special deposit in the sense that the bank must keep the money separate and apart from its general assets, but merely knows that the general deposit thus made is of trust funds; see 61 U. of Pa. Law Rev. 197-199 criticizing Smith v. Fuller (1912) 86 Ohio 57, 99 N. E. 214.

5. And this is true even if the trustee had no money of his own in the bank; *In re* Arguello (1893) 97 Cal. 196, 31 Pac. 937, Ames Trust Cas. 482.

6. Mulholland's Estate (1896) 175 Pa. 411, 415, 34 Atl. 735.

7. See *ante* § 302. Apparently the rule does not require him to disclose the names of the beneficiaries; nor does it prevent him from mingling several small trusts funds in one deposit.

§ 326. Collecting debts due the trust estate—payments.

The trustee should ordinarily collect debts due the trust estate as soon as they become due; if loss occurs because of unreasonable delay, he must answer for it.[1] It is no defense that it would have ruined the debtor to press him for payment, even where a good business might have delayed or even where the creator of the trust would have granted indulgence. He may, however, excuse himself by showing that more was probably to be realized on the claim by temporary indulgence than by prompt legal proceedings;[2] or if he can show[3] that there were no reasonable grounds for believing that anything could be realized by suing.[4]

Where it is the duty of the trustee to make payments out of the trust funds he has been held liable not only for due care in the matter but liable at peril if he should pay to the wrong person;[5] in such cases he should, if doubtful as to his duty, ask the court for instructions.[6]

§ 327. Extent of trustee's liability for breach.

If the trustee is guilty of misconduct—whether in making investments and collections or otherwise—and the trust funds are thereby wholly or partially lost, he

1. Lowson v. Copeland (1787) 2 Brown, Ch. Cas. 156, Ames Trust Cas. 493. See 21 Harv. Law Rev. 441.

2. Torrence v. Davidson (1885) 92 N. Ca. 437.

3. Apparently the trustee has not merely the burden of going forward and explaining but the burden of establishing; *Re* Brogden (1883) 38 Ch. D. 546, 572. It would seem that the burden of establishing should be on the *cestui* because there is no breach of trust if the trustee has acted reasonably.

4. Mitchell v. Trotter (1850) 7 Gratt. (Va.) 136. If the trustee compromises with the debtor he must show that it was a reasonable settlement of the claim; Moulton v. Holmes (1881) 57 Cal. 337.

5. Owings v. Rhodes (1886) 65 Md. 408 (no defence that he acted under advice of counsel).

6. *Re* Wylly's Trusts (1860) 28 Beav. 458; 19 Harv. Law Rev. 308; 15 *id.* 758.

is generally liable, for the amount thus lost with simple interest;[1] and this seems to be the general rule in the United States, whether the misconduct was active,[2] negligent[3] or innocent.[4] In England, however, a trustee who is guilty of active misconduct is liable for 5% while one who is merely negligent is liable for only 4%.[5]

If an investment wrongfully made by the trustee should be successful, the *cestui* has the option of taking the investment and calling upon the trustee for an accounting of the profits.[6] And if the trustee has wrongfully invested in trade he is chargeable with compound interest unless the trustee can prove that profits to that amount were not realized.[7] Where the trust is for accumulation he is chargeable with compound interest[8] and in a few cases, compound interest has been imposed on the ground of misconduct.[9]

IV. As to delegating trust duties.

§ 328. Right of transferee to office of trustee.

No one is bound to accept the office of trustee, but after once accepting it he cannot, by merely conveying the trust property to another, rid himself of any part

1. Robinson v. Robinson (1851) 1 D. Gex, McN. & G. 247, Ames Trust Cas. 495.

2. Bryant v. Craig (1847) 12 Ala. 354.

2. Ames v. Scudder (1884) 83 Mo. 189.

4. McComb v. Frink (1892) 149 U. S. 629. There are a few cases, however, holding that where the trustee has acted innocently, no interest should be charged against him; Saltmarsh v. Barnett (1862) 31 Beav. 349 (payment to wrong person by mistake); Southern Ry. Co. v. Glenn's Adm'r (1904) 102 Va. 529, 46 S. E. 776; (extra commissions retained by trustee under decree of court which was later reversed); 18 Harv. Law Rev. 70.

5. See Mousely v. Carr (1841) 4 Beav. 49.

6. Robinett's Appeal (1860) 36 Pa. 174.

7. Cruce v. Cruce (1884) 81 Mo. 676, 684.

8. Knott v. Cottee (1852) 16 Beav. 77.

9. Salsbury v. Colt (1875) 27 N. J. Eq. 492 (failure to invest for several years). See also Bryant v. Craig (1847) 12 Ala. 354.

of his trust duties. If he wishes to be relieved he must either get the consent of the *cestuis*—which will be effectual only if they are all *sui juris*[1]—or else secure a release from the proper equity court which will then appoint a substitute trustee.[2]

While a trustee's transferee is bound by the trust—unless he is a *bona fide* purchaser for value without notice[3]—he is not entitled by the transfer to perform the duties of the trustee's office. This applies not only to a transferee *inter vivos* but usually applies also to the heirs, devisees or executor of a decedent trustee.[4] The creator of the trust may, however, appoint the successors to the first appointees or provide that the first appointees shall choose their own successors.[5] Where property was vested in A "and his heirs" it was held that this amounted to the appointment of A's heir as A's successor upon A's death, at least until the *cestui* objected;[6] and if the property is conveyed to A, "his heirs and assigns, A's devisee has been held entitled to act,[7] but not an assignee *inter vivos*.[8] In several juris-

1. In Anon. (1819) 3 Swanst. 79, N. (a), Ames Trust Cas. 508 one who was trustee for a woman and children assigned the property to X with the consent of the woman, and was held liable for X's breach of trust.

2. Generally speaking, the substituted trustee succeeds to all the powers and duties of his predecessor; but where it is clear from the trust instrument that the creator of the trust intended certain powers to be exercised only by his appointee, such powers do not pass to the substitute appointed by the court; see 8 Col. Law Rev. 417 discussing Smith v. Floyd (1908) 108 N. Y. Supp. 775; see also 23 Harv. Law Rev. 59, 70.

3. See *ante* § 301.

4. Mortimer v. Ireland (1847) 11 Jurist 721, Ames Trust Cas. 508 (heir or executor); Cooke v. Crawford (1842) 13 Simons 91, Ames Trust Cas. 509 (devisee).

5. *In re* Morton and Hallett (1879) 15 Ch. D. 143.

6. *In re* Morton and Hallett, *supra*.

7. Titley v. Wolstenholme (1844) 7 Beav. 425.

8. Whittelsey v. Hughes (1866) 39 Mo. 13; 23 Harv. Law Rev. 59. Apparently the reason for this distinction is that it is not to be supposed that the creator of the trust meant his appointee to

dictions, upon the death of a sole trustee the title vests by statute in his personal representative or in the court.[9]

§ 329. Action by less than all the trustees.

In a private trust all the trustees must concur in order that their acts may be valid; no one of them can delegate his discretion to the others. Hence, if one of several trustees becomes insane,[1] or is unable to agree with the rest,[2] the court should appoint a substitute. A majority of trustees is not competent to act for all unless the trust instrument so provides;[3] and if a majority attempts to act without the consent of the minority, the latter should ask for an injunction against such action,[4] because their mere refusal to concur will not excuse them from liability for a breach of trust committed by the majority.[5] Where several trustees are appointed but some disclaim, those who accept are competent to perform the trust;[6] and apparently, where one of several trustees dies the survivor or survivors may execute the trust in the absence of an express provision in the trust instrument.[7]

give up his office voluntarily, not having provided specifically for the appointment of successors.

9. See *ante* § 272.

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1. In the Matter of Wadsworth (1847) 2 Barb. Ch. 381, Ames Trust Cas. 511.

2. Doily v. Sherratt (1735) 2 Eq. Abridg't 742, Ames Trust Cas. 511 (one of two trustees refused to act).

3. Swale v. Swale (1856) 22 Beav. 584, Ames Trust Cas. 512; or unless it is implied from the peculiar nature of the trust; Sloo v. Law (1856) 3 Blatch. 459.

4. Sloo v. Law, *supra.*

5. See Katz v. Miller (1912) 148 Wis. 63, 133 N. W. 1091; 74 Cent. Law J. 117 (inactive trustee bound by act of the other); Dix v. Burford (1854) 19 Beav. 409 (trustee liable for default of co-trustee).

6. Long v. Long (1883) 62 Md. 33. See *ante* § 273.

7. Lane v. Debenham (1853) 11 Hare 188, Ames Trust Cas. 513 (power to raise £2000 by sale or otherwise can be executed by

On the other hand, in trusts for a public purpose, a majority of the trustees may act unless the trust instrument provides otherwise.[8]

§ 330. Permissible employment of agents.

While a trustee may not delegate to another an act which requires discretion—such as the supervision of an auction sale of real estate[1] or the purchase of a mortgage security[2]—he may employ subordinates to perform mechanical duties which require technical skill rather than discretion, such as advertising the sale, auctioneering etc.[3] Furthermore, if in selling trust personalty[4] or in making investments of trust funds in public securities[5] it is the usual course of business to employ a broker the trustee may do so and will not be liable for loss if he uses due care in selecting the broker. And apparently he may employ an agent to

surviving trustee without direction of the court). See Perry, Trusts §§ 493, 505.

8. Hill v. Josselyn (1850) 21 Miss. 597; Sloo v. Law, *supra*.

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1. In Graham v. King (1872) 50 Mo. 22, Ames Trust Cas. 515, the trustee was not present at the sale but left the matter in the hands of his son, a minor. The *cestui* asked for and obtained an injunction against making a deed to the purchaser because the property sold for greatly below its value. "He must in person supervise and watch over the sale, and adjourn it, if necessary, to prevent a sacrifice of the property, and no one can do it in his stead, unless empowered thereto in the instrument creating the trust." If there are several trustees apparently all must supervise the sale; See Brennan v. Willson (1877) 71 N. Y. 502.

2. Bostock v. Floyer (1805) L. R. 1 Eq. 26.

3. See Powell v. Tuttle (1850) 3 N. Y. 396; Gillespie v. Smith, (1863) 29 Ill. 473. And a trustee about to invest on a mortgage security is entitled to employ an attorney to examine the title. See Hopgood v. Perkin (1870) 11 Eq. 74, criticised in *In re* Weall (1889) 42 Ch. D. 674, 678.

4. *Ex parte* Belchier (1754) Ambler 218, Ames Trust Cas. 516 (trustee employed broker to sell tobacco; the broker sold it, received the money and died insolvent ten days later).

5. Speight v. Gaunt (1883) 22 Ch. D. 727, Ames Trust Cas. 518 (trustee empowered by will to invest in certain securities em-

collect trust funds if they are to be collected in small amounts, such as rents.[6]

ployed a broker to obtain them; later the broker said he had obtained them, showed what purported to be a bought note and asked for payment. The trustee gave him his check for the amount; the broker used the money for himself and absconded). There is this difference between a broker who deals in real estate and one who deals in stock; the trustee can know where the land is but usually does not know where the stock will come from.

6. See *In re* Brier (1884) 26 Ch. D. 238; Donaldson v. Allen (1904) 182 Mo. 626, 81 S. W. 1151; Fesmire v. Shannon (1891) 143 Pa. 201, 22 Atl. 891.

CHAPTER VI

Reformation[1] of Instruments.

A. In General.

§ 331. Invulnerability of written instruments at common law.

At common law if a contract[2] or conveyance[3] were made in writing or if a contract were at first made orally or informally and later reduced to a written instrument, the written instrument was conclusive[4] as to the terms of such contract or conveyance. This was

1. "Rectification" or "restoration" would be preferable, but "reformation" seems to be the generally accepted term.

2. At common law there was no requirement that contracts be in writing; the Statute of Frauds, passed in 1675, required that in order to bring actions on certain classes of contracts there should be a memorandum of the contract, but this did not require that the contract itself be reduced to writing.

3. At common law oral conveyances of land by livery of seisin were common; at the present time practically all conveyances of interests in land are by deed. Transfers of personalty may or may not involve a deed.

4. This is usually called the parol evidence rule. It is not a rule of evidence, but a rule of substantive law as to what constitutes the legal transaction. For a careful and exhaustive analysis of this subject see Wigmore, Evidence Sec. 2400-2478, especially Sec. 2425. That part of the so-called parol evidence rule with which we are most concerned, is thus formulated by Professor Wigmore. "When a legal act is reduced into a single memorial, all other utterances of the parties

especially true of instruments under seal,[5] whether contracts or conveyances. The social interest in the security of transactions required that much importance be attached to these instruments but on the other hand to hold them absolutely invulnerable resulted in much injustice, if the instrument did not express the actual intent of the parties thereto. In order to relieve from this injustice an equity court will rectify or correct the written instrument so as to make it conform to the actual intent;[6] and having taken jurisdiction for this purpose will give whatever further relief is necessary to settle the whole case.[7]

§ 332. Standard for rectification.

Apparently all instruments except wills[1] are subject to reformation. But the standard by which the instrument is corrected depends upon whether the instrument involved was executed in pursuance of a bilateral or business transaction in which there was a bargain between two or more parties or whether the transaction was a voluntary, unilateral transaction requiring nothing more than a mere assent on the part of the donee. In the former class of cases the standard

on that topic are legally immaterial for the purpose of determining what are the terms of their act."

5. See Wigmore, Evidence Sec. 2426 for the early history of seals.

6. Besides the parol evidence rule there was still another obstacle to getting reformation at common law: namely, the lack of power of a common law court to issue a command to a litigant. While there are a few cases in which equity courts have assumed the power to give their decrees of reformation an *in rem* effect, (see post § 361), reformation is more usually accomplished by ordering the defendant to execute a conveyance or contract. That a common law court will not give reformation, see Ivinson v. Hutton (1878) 98 U. S. 79.

7. See *ante* § 24.

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1. See *post* § 351.

of rectification is the bargain of the parties; in the latter, it is the intent of the donor.

B. Bilateral Transactions.

§ 333. Mutual mistake.

If, on account of a mistake common to both parties to a bilateral transaction the written instrument does not express the true agreement of the parties, equity will generally correct the instrument so as to conform to the actual bargain. Perhaps the most common instance is that of a conveyance which, because of a mistake of the scrivener not discovered by either party, describes two much or too little property. And where the mistake has been innocently repeated in successive conveyances, the right to reformation and the corresponding obligation to submit to such rectification passes to the respective grantees. In Cole v. Ficket[1] A bargained to convey lots X and Y to B; by mistake of the scrivener the deed described only X. B went into possession of X and Y and later sold them to the plaintiff, but the conveyance repeated the original mistake; the plaintiff went into possession of X and Y. A later bargained to convey lot Z to D, but by mistake the deed described both Y and Z; D went into possession of lot Z only; D died and the property descended to the defendant. It was held that the plaintiff was entitled to reformation not only against D who had paid nothing for lot Y but also against the defendant who likewise had paid nothing for it.

§ 334. Same—correction of price.

In Paine v. Upton[1] the defendant sold to the plaintiff a farm supposed to contain 220 acres at a little less than $150 an acre. It was later found that the

1. (1901) 95 Me. 265, 49 Atl. 1066, 2 Ames Eq. Cas. 178.

1. (1882) 87 N. Y. 327, 2 Ames Eq. Cas. 213.

farm contained only 206 acres. The plaintiff asked for and was given a proportional abatement of the price. However, the error did not consist in the description of the land covered by the conveyance, but in the acreage of the land conveyed; and since the price of the land was fixed upon the basis of acreage there was an error in the price. If the land had been sold for a lump sum, it would have required a much greater discrepancy than that in the principal case to obtain relief.[2]

It may well be urged that even though the price was fixed according to acreage that the seller might have been unwilling to sell or the buyer to buy if he had known the real acreage and therefore that rectifying the price is an unwarranted interference with the parties' agreement. But if in Paine v. Upton no deed whatever had been made the purchaser could have obtained specific performance with compensation for

2. For example, because the sale was by the tract and not by the acre, relief was denied in Capshaw v. Fennell (1848) 12 Ala. 780 where the percentage of deficiency was practically that in Paine v. Upton (282 instead of 300 acres); whereas relief was given in Smith v. Fly (1859) 24 Tex. 345, the discrepancy being very much greater (385 instead of 500 acres). In Harrison v. Talbott (1834) 32 Ky. 258, 266 the court made the following analysis: "Sales in gross may be subdivided into various subordinate classifications: 1st. Sales strictly and essentially by the tract, without reference, in the negotiation or in the consideration, to any estimated or designated quantity of acres. 2nd, sales of the like kind, in which, tho a supposed quantity by estimation is mentioned or referred to in the contract, the reference was made only for the purpose of description, and under such circumstances, or in such manner as to show that the parties intended to risk the contingency of quantity, whatever it might be, or how much soever it might execute or fall short of, that which was mentioned in the contract. 3rd. Sales in which it is evident, from extraneous circumstances of locality, value, price, time, and the conduct and conversations of the parties, that they did not contemplate, or intend to risk more than the usual rates of excess or deficit in similar cases, or than such as might be reasonably calculated on as within the range of ordinary contingency. 4th. Sales which, though technically deemed and denominated sales in gross are in fact, sales by the acre, and so understood by the parties. Contracts belong-

the 14 acres deficiency;[3] it would therefore be inconsistent with the doctrine of specific performance with compensation to refuse to rectify the price merely because a deed has been made.

If the default of the vendor is relatively slight either the vendor or the purchaser may have specific performance with compensation; but if the default is relatively large the purchaser has frequently been allowed specific performance with compensation, or rescission at his option.[4] It would seem to follow, therefore, that if the conveyance has been made and the discrepancy is large, a purchaser should be given the option[5] of having the price corrected or having the whole transaction rescinded.

§ 335. Plaintiff's mistake caused innocently by the defendant.

Since the plaintiff is usually entitled to have an instrument reformed where the error has been due to a mistake common to both parties, the plaintiff stands in at least as strong a position where the defendant has innocently caused the mistake. In Snell v. Atlantic, etc. Insurance Co.,[1] one Keith, a member of the firm of Snell, Taylor & Co., applied to the defendant for fire insurance on cotton on behalf of the firm and the defendant agreed to insure; the policy was made out in Keith's name, the defendant's agent assuring Keith that the firm's rights were thus fully protected. A

ing to either of the two first mentioned classes, whether executed or executory, should not be modified by the chancellor when there has been no fraud, . . . But in sales of either of the latter kinds, an unreasonable surplus or deficit, may entitle the injured party to equitable relief, unless he has by his conduct waived or forfeited his equity."

3. See *ante* § 122.

4. See *ante* § 122.

5. Lawrence v. Staigg (1866), 8 R. I. 256, 2 Ames Eq. Cas. 220.

1. (1878) 98 U. S. 85.

loss having occurred the court rectified the policy so as to protect the interests of the firm.[2]

§ 336. Defendant cognizant of plaintiff's mistake.

If at the time the plaintiff thinks he is making a bargain with the defendant the latter knows that the plaintiff is suffering under a misapprehension as to the terms of his offer of acceptance, the defendant's fraudulent conduct entitles the plaintiff to have the contract or conveyance rescinded on the ground that there was not a real bargain; for this very reason that there was not a real meeting of the minds, reformation is obviously impossible because there is no prior bargain to restore.

In Gun v. McCarthy[1] the plaintiff had executed a lease of certain premises at an annual rental of £33 10s. The trial court was of opinion that the figures £33 10s in the plaintiff's offer were a mistake on the part of the plaintiff's agent for £53 10s or some higher rent and that the defendant knew it was a mistake; on the other hand, it was not shown that the defendant ever entered into any agreement to take the premises at £53 10s or at any other rent than £33 10s. In refusing to give reformation the court said: "To reform implies a previous agreement; but when the evidence shows that there was no agreement to which both parties assented, but only a mistake on one side and not a common mistake, in my opinion it is impossible to support a suit to reform, whatever equity the party

2. See accord, Kyle v. Fehley (1892), 81 Wis. 67, 51 N. W. 257, where an omission in a conveyance was brought about by the representation of the attorney of the party against whom reformation was sought.

1. (1883) L. R. Irish 13 Ch. D. 304, 2 Ames Eq. Cas. 233.

who has made the mistake may have in certain cases to rescind the conveyance."

§ 337. Same—option of reformation or rescission.

Logically, neither party should have the option of reformation or rescission.[1] "Reformation is an affirmance of the bargain as it was actually made. Rescission, on the other hand, is a disaffirmance of the bargain itself. It is the antithesis of reformation. Consequently, a mistake which is ground for reformation will not justify rescission in any ordinary case; while a mistake which is ground for rescission will not justify reformation, since it strikes at the bargain which must serve as the standard for reformation."[2]

Nevertheless in a few cases when the defendant probably knew of the plaintiff's mistake at the time of entering into the transaction, the option has been given to the defendant[3] of rescinding or rectifying the instrument so as to correspond to the plaintiff's understanding. If a plaintiff has in his bill asked in the alternative for rectification or rescission, there would seem to be no great objection to such a decree; this was the reason given by the court in Paget v. Marshall[4] and perhaps influenced the court in Garrard v. Frankel.[5]

1. The case already discussed (*ante* § 334) of allowing a purchaser the option of rescission or reformation of the price is as anomalous as the doctrine of specific performance with compensation, to which it is related. See *ante* § 122.

2. Mistake of Fact as a Ground for Equitable Relief, by Edwin H. Abbott, Jr. 23 Am. Law Rev. 608, 610. See also Gun v. McCarty (1883) 13 Ch. D. Irish; 304, 2 Ames Eq. Cas. 238, discussed *ante* § 336.

3. When the evidence is clear that the defendant knew of the plaintiff's mistake, it may be suggested that it is the plaintiff who should have the option; but to give the plaintiff the option to compel rectification to his own intent which has never been concurred in by the defendant would be in the nature of affirmatively penalizing the defendant for his fraudulent conduct and also an unwarranted interference with freedom of contract.

4. (1884) L. R. 28 Ch. D. 255.

5. (1862) 30 Beav. 445. The case was followed in Bloomer v.

A court might also be justified in giving the defendant the benefit of the doubt where there is conflicting evidence as to the existence of a prior agreement.[6] But the mere fact that the blunder was that of the plaintiff[7] would seem to be no justifiable reason for allowing the defendant to speculate on the plaintiff's blunder[8] without fear of loss to himself.[9]

§ 338. Fraud in performance of a contract or in reducing a bargain to writing.

If a bargain has actually been entered into, the fraud of the defendant either in reducing the bargain to writing or in performing the contract, will not prevent the plaintiff from getting reformation. In Lee & Jameson v. Percival[1] action had been brought on a promissory note; the defendants asked that the note be reformed so as to bind only the corporation of which

Spittle (1872) L. R., 13 Eq. 427, 2 Ames Eq. Cas. 309 where the option was given to the defendant apparently because of the plaintiff's delay of four years, conflicting evidence as to whether there was a prior agreement and the fact that the plaintiff asked for rectification.

6. There is a suggestion of this in Garrard v. Frankel, *supra*.

7. Such was the reason given in Brown v. Lamphear (1862) 35 Vt. 252, 2 Ames Eq. Cas. 203.

8. To illustrate: In Garrard v. Frankel the plaintiff in leasing premises to the defendant inserted £ 130 as the rental instead of £ 230; as long as the rental value does not go below £ 130 the defendant cannot lose; if it goes below £ 230 but not below £ 130 he can elect to rescind and thus escape loss, whereas if the value of the lease increases beyond £ 230 he can be sure of this benefit by electing to accept rectification.

9. It seems that if reformation has become impossible rescission may be granted as a substitute therefor. In Abbot v. Dow (1907) 133 Wis. 533, 113 N. W. 960, the written agreement for the purchase of a lot described lot Y instead of lot X: before the mistake was discovered the vendor conveyed lot X to an innocent purchaser for value so that reformation became impossible. The plaintiff was therefore given rescission with the return of that part of the purchase price already paid.

1. (1892) 85 Iowa 639.

they were officers and not themselves individually. It was held that reformation should be given because the other party "must have known the intent with which the note was signed, and must have believed that it was the note of the company only, or else they received it fraudulently, knowing of the mistake of the defendants and intending to profit by it."

In Hitchins v. Pettingill[2] the plaintiffs bought a farm of the defendants and paid for it; by the fraud of the defendants ten acres of the farm was omitted from the deed. Reformation was given by requiring the defendants to convey the omitted parcel.

In Cleghorn v. Zumwalt[3] the conveyance purported to convey "all my interest." At the time of contract both parties thought that the grantee had 1/5 interest but it turned out that she had 3/5 interest. It was held that the grantee was entitled to have the deed corrected so as to convey one-fifth only, whether at the time of the delivery of the deed the defendant did or did not know of the mistake.[4]

§ 339. Plaintiff alone mistaken, defendant innocent. If in making the bargain the plaintiff has made a mistake but the defendant is ignorant thereof, reformation is obviously impossible because there is no previous agreement to restore. In several such cases reformation has been sought and refused. In Page v. Higgins[1] the grantor did not suppose that the con-

2. (1876) 58 N. H. 3, 2 Ames. Eq. Cas. 307.

3. (1890) 83 Cal. 155, 23 Pac. 294, 2 Ames Eq. Cas. 197.

4. For a similar case see Kersten v. Myers (1888) 115 Ind. 312. In Palmer v. Hartford Fire Ins. Co. (1887) 54 Conn. 488, 9 Atl. 248, the previous agreement rested largely upon implication. The plaintiff asked the defendant to renew an insurance policy: the defendant's agent wrote a policy and placed in it a co-insurance clause which was not in the original policy, but did not notify the plaintiff of the change. The court held that the plaintiff was entitled to reformation whether the defendant's conduct was due to mistake or fraud.

1. (1889) 150 Mass. 27, 22 N. E. 63, 2 Ames Eq. Cas. 188.

veyance which he executed included a certain piece of land; reformation was denied because the grantee did not share the mistake. And in Doniol v. Commercial Fire Ins. Co.[2] where a fire insurance policy was mistakenly taken out in the name of the owner's wife, reformation was denied because there was nothing to show that the defendant's agents knew anything about the ownership of the property.[3]

§ 340. Mistake as to collateral matter.

Reformation has sometimes been sought in cases where there was no mistake in the instrument but where the bargain would not have been made if there had not been a mutual mistake as to some collateral or extrinsic fact. In Whittemore v. Farrington[1] the plaintiff accepted a quitclaim deed from the defendant in place of a warranty, both parties thinking there was no incumbrance, and that therefore a quitclaim was as good as a warranty. Reformation was properly refused because there was no mistake in the quitclaim deed itself but merely a mistake as to its value. Similarly in Hunt v. Rousmaniere[2] the plaintiff had deliberately chosen a power of attorney as a more satisfactory security than a mortgage; he was therefore not entitled to have a mortgage substituted for the power of attorney merely because the latter turned out to be unsatisfactory.

In Barrow v. Barrow[3] a fund was left out of a

2. (1881) 34 N. J. Eq. 30, 2 Ames Eq. Cas. 237.

3. In Mackenzie v. Coulson (1869) L. R. 8 Eq. Cas. 368, the plaintiff insurance company issued to defendant a policy with the phrase "average recoverable as customary," by mistake for "free from particular average." Relief was refused because the defendant was not mistaken and did not know of the plaintiff's mistake.

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1. (1879) 76 N. Y. 452, 2 Ames Eq. Cas. 208.

2. (1828) 1 Peters 1, 2 Ames Eq. Cas. 250.

3. (1854) 18 Beav. 529, 2 Ames Eq. Cas. 199.

marriage settlement because the parties thought it was unnecessary to include it. There having been no previous agreement that it should be included reformation was of course denied, the mistake going merely to the motive of the parties in making the omission.

It is not always easy to determine whether the mistake is as to quantity or as to value. In Okill v. Whittaker[4] the plaintiff sold to the defendant the rest of a lease of twenty-one years, thinking that over twelve years had elapsed, whereas only a few days had expired. After the grantee had been in possession for ten years the grantor asked for reformation—that the defendant be held entitled to only the eight years of the lease which the parties erroneously thought remained. Relief was denied on the ground that it was a mere mistake as to the value of the lease, but it is difficult to agree with such reasoning.[5] Unless the plaintiff's delay were inequitable it would seem that he should have the relief he asked, unless it were important to the defendant to have the last end of the lease so as to have the privilege of renewal; in the latter case the defendant should have the option to keep the lease upon paying a proportional price therefor.[6]

If the mistake as to a collateral fact has no real bearing upon the transaction it is obviously no ground

4. (1847) 2 Phillips 338; 2 Ames Eq. Cas. 201.

5. The court attempts to liken the case to a sale of a farm for a lump sum, the farm turning out to have 250 acres instead of 200. But the difference between eight years and twenty-one years is much more serious.

6. In Webster v. Stark (1882) 10 Lea 406 the plaintiff made a written contract to buy a mill from the defendant. The plaintiff supposed that the mill was entirely on lot 19 but wishing extra space he bargained for lot 21 also; it turned out that the mill was partly on lot 17 and the plaintiff now wishes to have "21" changed to "17." One of the grounds for refusing relief was that the mistake was as to an extrinsic fact.

for reformation. In Jeakins v. Frazier[7] the plaintiff sold and conveyed to the defendant a one-half interest in his deceased wife's estate, both parties supposing that the plaintiff owned only one-half. As a matter of fact the plaintiff owned 8/14 and the defendant asks for reformation by a conveyance of the other 1/14. If the defendant had offered a proportional price for the extra 1/14 he might perhaps have been entitled upon the same principles as are involved in cases giving reformation of price;[8] but having made no such offer reformation was properly denied either upon the ground that there was no prior agreement for 8/14 but merely for 1/2, or that the mistake as to the plaintiff's ownership of another 1/14 had at most only a slight bearing on the transaction.[9]

C. UNILATERAL OR VOLUNTARY TRANSACTIONS.

§ 341. The intent of the donor.

In bilateral or business transactions reformation is impossible in the nature of things unless there is a previous agreement to which the written instrument is to be conformed. In unilateral transactions, on the other hand, since the donee needs at most to give a mere assent to the gift, the donor's intent is the important factor and reformation is made, if at all, to such intent.

§ 342. Relief to the donor.

If the donor conveys more to the donee than he intended he is entitled to have the instrument so rectified as to convey only that which he did intend. In

7. (1902) 64 Kansas 267, 67 Pac. 854, 2 Ames Eq. Cas. 268.

8. See *ante* § 334.

9. If it be suggested that the defendant might not wish to be a co-owner with the plaintiff, the answer is that he could probably avoid this by paying *pro rata* for the extra 1/14.

Andrews v. Andrews[1] the plaintiff by mistake conveyed to his mother a fee instead of a life estate. It did not appear whether the mother knew of the mistake or not, nor was such fact mentioned. Reformation was granted against the heirs of the mother, the latter having died before the suit was begun.

§ 343. Relief against donor—who are volunteers.

If the conveyance conveys less than was intended by the donor or if the conveyance is defective and therefore conveys nothing, a mere volunteer can not as against the donor himself get reformation of the deed any more than he could get specific performance of the promise to make the gift before any conveyance was attempted by the donor.[1]

A creditor, however, though he could not have compelled his debtor to give him security for his debt, is usually given equitable relief where the debtor has given security but by mistake has conveyed less than he intended to convey.[2] In other words, the courts here have recognized the existence of a specific equity of

1. (1859) 12 Ind. 348, 2 Ames Eq. Cas. 245.

1. Eaton v. Eaton (1862) 15 Wisc. 259; 2 Ames Eq. Cas. 244: "It is well settled that equity will not interfere to enforce a voluntary contract to convey. A defective attempt to make a voluntary conveyance stands upon the same ground. Judicial tribunals act to enforce legal obligations, not to compel parties to carry into execution mere benevolent intentions, which they may once have entertained, but have subsequently abandoned. So far as giving is concerned, they are allowed to say, as Falstaff did of reasons, that they will not give upon compulsion."

2. In Hoyt v. Oliver (1875) 59 Mo. 189 the court in giving relief said: "While it is true that courts of equity will not rectify a voluntary deed unless all the parties thereto consent: yet the one under consideration cannot be thus regarded as the existing indebtedness of the grantee was a valuable and sufficient consideration for making the deed to secure such indebtedness."

reformation[3] as distinguished from reformation as a mere means of enforcing specific performance or a constructive trust.[4] And the same reasoning has been applied where the debtor has attempted to make a conveyance in payment of a pre-existing obligation.[5]

Where a husband has attempted to make a conveyance to the wife, the wife has been given reformation even in the husband's lifetime,[6] on the ground that the husband's obligation to provide for her saved her from being a mere volunteer.

§ 344. Reformation against representatives of deceased.

If a creditor or wife could have obtained reformation in the lifetime of the debtor or husband, similar relief will, of course, be given after the donor's death.[1] In some cases, however, when the donee or intended

3. Of course if there is a specifically enforcible contract to give security, there is no difficulty about giving reformation. Welton v. Tizzard (1864) 15 Iowa 455. See *ante* § 51.

4. It is interesting to note that the creditor's equity is not enforced to the same extent as the ordinary equity of reformation: see *post* § 360; equitable relief being usually refused as against other creditors equally meritorious. Knight v. Bunn (1850) 7 Iredell Eq. 77; 2 Ames Eq. Cas. 242.

5. Comstock v. Coon (1893) 135 Ind. 640, 35 N. E. 909, (attempted conveyance to wife for pre-existing debt.) See also Rea v. Wilson (1910) 112 Iowa 517, 84 N. W. 539.

6. Stewart v. Brand (1867) 23 Iowa 477. Cf. *ante* § 267 where a conveyance to the wife which was inoperative at law was upheld as a valid declaration of trust for the wife. Whether a promise under seal to convey land to the wife in the future would be specifically enforced in equity, *quaere*.

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1. In Welch's Adm. v. Welch (1892) 13 Ky. Law. Rep. 639, the husband had taken out a policy on his own life with the assurance of the defendant's agent that the money would go to his wife and also that since the wife was not present the policy could not legally be made payable to her. After his death his widow was held entitled to reformation as against his creditors; this would lead us to suppose that the equity existed before the husband's death, but the court does not discuss the point.

donee would have been denied relief during the donor's lifetime as being a mere volunteer, reformation has been granted after the donor's death. In McMechan v. Warburton[2] the court, in giving relief, said: "If the donor were living it would have, of course, been competent for him to consent[3] to such rectification or to dissent from it. If the latter, it could not be reformed against his will, for a volunteer must take the gift as he finds it; but after his death, and in the absence of any proof of intention it cannot be assumed that he would have dissented,[4] and it might even be presumed that he would not dissent."

The doctrine has been criticized[5] and there are cases to the contrary.[6] If it is to be justified at all it must be upon the ground that as between volunteers it is better to carry out the intention of the decedent than to allow it to be defeated for failure of rectification, it being now too late for the donor himself to correct the error. There would seem to be little difference whether the parties against whom reformation is sought received the property from the donor by descent or devise or by the conveyance in which the mistakes occurred; possibly the latter is the stronger case for relief because the donor himself had an equity of reformation at the time of his

2. (1894) L. R. Irish 1 Ch. D. 435, Ames 246. See also Huss & Morris (1869) 63 Pa. W. 367.

3. *Quaere* as to whether such assent would be good as against his own creditors.

4. If his attention had been called to the errors and he had expressed an intent not to correct it, it would seem clear enough that reformation should be refused.

5. 23 Harv. Law Rev. 608, 620: "But if the donee had no equity against the donor in the donor's life time, it is hard to see how the death of the donor can raise one against those who take what the donor left."

6. See Shears v. Western (1896) 110 Mich. 505, 68 N. W. 266. Relief is sometimes denied, where reformation would result in an inequitable distribution of the late donor's property. Hout v. Hout (1870) 20 O. St. 119.

death. In Wyche v. Greene[7] A intended to convey some slaves to his daughter P for life with remainder in fee to her issue. The conveyance was so drawn, however, as to convey the entire interest to P. After the death of both A and P, the children of P ask that the deed be so reformed as to give the slaves to them instead of to their father, the husband of P. Logically relief should be granted to the donor's personal representatives against the husband but since it is now too late for the donor to correct the error, no great harm is done by allowing relief to the intended donees instead.[8]

D. MISTAKE OF LAW.

§ 345. Historical development of the subject.

As a matter of principle, no distinction should be drawn between mistakes of fact and mistakes of law,[1] and such apparently was the very early rule. In Simpson v. Vaughan,[2] reformation was given where a bond was drawn up so as to bind the parties jointly only instead of jointly and severally; the mistake was quite evidently one of law because the court remarks that "Baker, one of the obligors, who filled it up, is only a tradesman, and entirely unacquainted with the common forms of bonds, when money is lent to two persons." In 1802 came Lord Ellenborough's unfortunate decision

7. (1854) 16 Ga. 49, 2 Ames Eq. Cas. 289.

8. The following is a somewhat similar situation: If A devises property to B upon an oral trust for C and B learns of A's intention before A's death, C is entitled to the property and not A's heirs. See *ante*, § 292. This holding can be justified only upon the practical reason given in the text.

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1. See § 166: Mistake of Law as a Defense to Specific Performance.

2. (1739) 2 Atk. 31. For a still earlier case when reformation was granted tho the mistake was apparently one of law, see Peake v. Peake (1577) Choyce Cases in Chancery 116, where words of inheritance had been omitted.

in Bilbie v. Lumley[3] that one who has paid money in ignorance of law can not recover it back, because "every man must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might be carried. It would be urged in almost every case." In Lowrie v. Bourdieu[4] money paid under a mere mistake of the law was endeavored to be recovered back; and there Butler, J. observed that "*ignorantia juris non excusat.*" Lord Ellenborough evidently regarded the statement that "every man must be taken to be cognizant of the law" as substantially the equivalent of the maxim that ignorance of the law does not excuse. It has been pointed out repeatedly,[5] both by courts and text writers that the maxim implies delinquency of some sort—either the commission of a crime or tort or the breach of a contract—and cannot properly apply, either in law or equity, to one who has done no wrong but merely seeks to prevent loss to himself. In spite of this, however, Lord Ellenborough's notion has so far prevailed both in law and in equity that the rule is usually stated that equity will give no relief against mistakes of law.[6]

§ 346. Present state of the law.

There are very few actual decisions which can properly be counted as precedents against giving ref-

3. (1802) 2 East 469. It is not without significance that Lord Ellenborough's legal experience had been chiefly in the field of criminal law where the phrases "ignorance of the law is no excuse" and "every one is presumed to know the law" are practically coterminous, because in a criminal prosecution it would be almost invariably the defendant who would urge ignorance of law. But even in criminal law it is not always true that ignorance of law does not excuse. If due to such ignorance one claimed as his own the chattel of another he would not be guilty of larceny.

4. (1780) 2 Dougl. 468.

5. Woodward, Quasi Contracts § 36; Culbreath v. Culbreath (1849) 7 Ga. 64.

6. Fowler v. Black (1891) 136 Ill. 313, 26 N. E. 596. And see 8 Col. Law Rev. 211.

ormation because the mistake was one of law. In Hunt v. Rousmaniere[1] the court's refusal to substitute a mortgage for a power of attorney was not really because it was ignorance of the law that was involved but because the mistake was one as to the relative value of the two forms of security; even if the mistake as to value had been due to an erroneous assumption of fact instead of law, relief would have been refused.[2] So numerous are the decisions[3] giving reformation for mistakes of law that one is not surprised to find it judicially declared[4] that "the rule has no application to mistakes in the language of a contract or in the choice of the form of an instrument whereby it has an effect different from the intentions of the parties." In some cases the courts in giving relief have emphasized the fact that the plaintiff's mistake was due to the defendant's representations,[5] whereas in others they have said flatly that "whether

1. (1828) 1 Peters 1, 2 Ames Eq. Cas. 250.

2. See *ante* § 340.

3. Canedy v. Marcy (1859) 13 Gray 373, 2 Ames Eq. Case 256 (parties supposed that the words "except the widow's right of dower" would reserve also the reversionary interest of the heirs); McNaughton v. Partridge (1845) 11 Ohio 223, 2 Ames. Eq. Cas. 279 (bond was intended to bind a partnership but bound only one partner); Blakeman v. Blakeman (1872) 39 Conn. 320 (mistake as to the effect of "privileges and appurtenances" in a deed); Pitcher v. Hennesy (1872) 48 N. Y. 415 (mistake as to effect of "risks of navigation"). See also 7 Col. L. Rev. 362.

4. Stafford v. Fetters, (1881) 55 Iowa 484. In that case an ordinary indorsement was made thinking that it was the proper method of making an indorsement without protest. A similar position was taken by the court in Dinwiddie v. Self (1893) 145 Ill. 290, 33 N. E. 892, where "bodily heirs" was put in a deed instead of "heirs." See also 24 Harv. Law Rev. 394, 395; "especially in the matter of reformation the general rule has been much relaxed."

5. Snell v. Insurance Co. (1878) 98 U. S. 85 (policy taken out in name of one partner instead of in the name of the firm); Kyle v. Fehley (1892) 81 Wisc. 67, 51 N. W. 257 (deed omitted to state that the conveyance was made subject to a lease).

the mistakes now in question be regarded as one of law or one of fact, is not of much consequence."[6] Reformation has been refused in a few cases where the courts have felt bound by precedent and where they could find no plausible reason for an exception.[7]

E. Kind and Amount of Proof Required.

§ 347. The so-called parol evidence rule.

As already stated,[1] if at common law a contract or conveyance were made in writing or if a contract were at first made orally or informally and later reduced to a written instrument, the instrument thus produced fixed the terms of the contract or conveyance. This rule is a rule of substantive law but since it is usually called in question by one of the parties wishing to introduce extrinsic evidence[2] to show what the transaction was, it has come to be miscalled "the parol[3] evidence rule". If the rule had been applied as rigidly in equity as it is at common law, it is obvious that very little of the equitable subject of reformation of instruments would have come into existence. As the court said in Tabor v. Cilley:[4] "The objection of the defendants that parol testi-

6. Park Bros. v. Blodgett & Clapp Co. (1854) 64 Conn. 28. For a statement of the history of the rule and an argument for the sound doctrine see 7 Col. Law Rev. 498-518.

7. Fowler v. Black (1891) 136 Ill. 363, 26 N. E. 596, 2 Ames Eq. Cas. 293, bill to reform deed by substituting "children" for "heirs." The court took the position that because it was a "mere naked mistake of law, unattended by special circumstances" no relief could be given. But in the cases cited *supra* there seem to have been no special circumstances.

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1. See *ante* § 331.

2. And since further the evidence thus offered is usually oral.

3. "Parol" may have any one of three meanings. In the early law it meant merely "not under seal," whether in writing or not; at the present time it is more likely to mean "oral," but in the so-called parol evidence rule it properly means anything extrinsic to the instrument in question. In the great majority of cases the extrinsic evidence thus offered is oral.

4. (1881) 53 Vt. 487, 2 Ames Eq. Cas. 231.

mony is not admissible to show that the actual contract was different from that expressed in the deed, we think, is not well taken. The jurisdiction of a court of equity to reform a contract and make it conform to the actual agreement of the parties, is well established; and from the nature of the case, when the written contract expresses a different agreement, the actual and oral contract can only be proved by parol evidence.'"[5]

The only proper effect of the so-called parol evidence rule upon the subject of reformation of instruments is to require more than a mere preponderance of the evidence in proving the mistake,[6] but in a few cases relief has been refused apparently upon the ground that the rule was as effective as at common law. There is a tendency, however, to confuse the rule with the Statute of Frauds so that it is difficult to tell whether the court is relying upon the one or the other. In Woolam v. Hearn[7] the plaintiff asked to have reformed an agreement for a lease by substituting £60 rental for £73 10s rental and for specific performance of the agreement as reformed. In refusing relief the court said: "By the rule of law, independent of the statute, parol evidence cannot be received to contradict a written agreement. To admit it for the purpose of proving that the written instrument does not contain the real agreement would be the same as receiving it for every purpose. It was for the purpose of shutting out that inquiry that the rule of law was adopted . . . Thus stands the rule of law. But when equity is called upon to exercise its peculiar jurisdiction

5. See also Baker v. Paine (1750), 1 Ves. Sr. 456 in which Lord Hardwicke said: "How can a mistake in an agreement be proved except by parol evidence?" And see Park Bros. & Co. v. Blodgett & Clapp Co. (1894) 64 Conn. 28; "he was thereby entitled to the parol evidence: for in no other way ordinarily can the mistake be shown."

6. Leslie v. O'Neil (1913) 108 Ark. 607, 156 S. W. 1017.

7. (1802) 7 Ves. 211, 2 Ames Eq. Cas. 297.

by decreeing specific performance, the party to be charged is let in to show that under the circumstances the plaintiff is not entitled to have the agreement specifically performed . . . But this evidence is offered, not for the purpose of resisting but of obtaining a decree: first to falsify the written agreement; and then to substitute in its place a parol agreement, to be executed by the court. Thinking, as I do, that the statute has been already too much broken in upon by supposed equitable exceptions, I shall not go further in receiving and giving effect to parol evidence than I am forced by precedent." Were it not for the mention of "the statute" in the last sentence, one would suppose that the court was thinking of the so-called parol evidence rule and not of the Statute of Frauds. In Macomber v. Peckham[8] the court said: "The doctrine of the English Chancery Courts is that oral testimony is not admissible for the purpose of reforming an executory contract in writing and then enforcing it, no matter whether the contract be within the statute or not."

§ 348. Statute of Frauds—English rule.

The so-called parol evidence rule applies only where the parties have—usually voluntarily[1]—reduced their transaction to a single memorial.[2] The Statute of Frauds, on the other hand, does not require any such formal document[3] but does require that the evidence be in writing. Just how far, if at all, English equity has refused to give effect to oral evidence in reformation

8. (1889) 16 R. I. 485, 17 Atl. 910.

1. Sometimes integration is required either by common law or statute; Wigmore, Evidence §§ 2450-2453.

2. Theoretically the rule would apply when the act was embodied in oral form; Wigmore, Evidence § 2426.

3. The memorandum may be quite informal and be scattered through many writings such at letters, telegrams, etc.

cases it is difficult to say.[4] In May v. Platt[5] an action was brought by a purchaser for breach of his vendor's covenant for title. The defendant by way of counterclaim sought reformation on the ground that the plot involved had been included in the conveyance by mistake. Reformation was refused, the court saying: "In a suit for rectification, parol evidence of mutual mistake is of course admissible to show that the completed deed[6] is not in accordance with the true agreement of the parties; but when such agreement is itself in writing and is plain and unambiguous and in exact accord with the deed, it is obvious that the person claiming rectification must first rectify the agreement.[7] But what does that involve? In a case like the present, where the vendor counterclaims for rectification only, he necessarily implies that he desires the transaction to stand as rectified, or in other words, starting *de novo* with the contract he first asks the court to rectify it and then to grant specific performance of the contract as rectified.[8] This

4. In Atty Gen'l v. Sitwell (1835) 1 Y. & C. 559, Baron Alderson said: "I cannot help feeling that, in the case of an executory agreement, first to reform and then to decree an execution of it would be virtually to repeal the Statute of Frauds."

5. (1900) 1 Ch. D. 616, 2 Ames Eq. Cas. 300.

6. In Johnson v. Bragge (1901) 1 Ch. 28 a marriage settlement was rectified so as to conform to a previous oral agreement.

7. Is this really obvious? It is difficult to see how the existence of a prior written agreement should have any other effect than perhaps to require stronger proof of the mistake. Is it really necessary to reform the written agreement? Why not reform the deed and ignore the written agreement if the proof is sufficiently cogent?

8. The court here seems to assume that if before making the deed the parties have attempted to reduce their oral bargain to writing, that in such a case if rectification is sought there is involved the giving of specific performance, whereas if no such attempt had been made, specific performance would not have been involved. It is difficult to follow such reasoning. Perhaps it should be added here that in May v. Platt the deed conveyed too much instead of too little and therefore involved principles of constructive trust instead of specific performance.

is contrary to the well settled practice, established by such cases as Woolam v. Hearn,[9] that a plaintiff cannot have specific performance of a contract with a parol variation."

Considering May v. Platt in connection with Johnson v. Bragge[10] it is obvious that the real basis for the decision in May v. Platt is not the Statute of Frauds because it is impossible to see how the attempted reduction of the bargain to writing could have any bearing upon the question whether the statute is to be applied so as to deny affirmative effect to the oral bargain. On the other hand, it is difficult to explain the two cases on the ground of the parol evidence rule, because that rule would logically apply to a deed whether preceded or not by a written contract.

The English rule may therefore be summed up thus: Equity will disregard both the Statute of Frauds and the parol evidence rule if only a deed is involved, but will refuse to give reformation if between the oral bargain and the deed there has intervened an erroneous written contract. It is difficult to see any justification for such a rule.

§ 349. Same—minority view in the United States.

Where, because of a mistake, a deed has conveyed too much[1] to the defendant, the latter stands in the position of a constructive trustee in respect to such excess, and therefore the Statute of Frauds—usually by

9. See *ante* § 347.

10. See *supra*, footnote 6.

11. The language of the court seems to indicate that they had in mind the parol evidence rule and not the statute of frauds; the only thing that could possibly be construed as a reference to the statute is the citation of Woolam v. Hearn, which, as has already been indicated, makes only an unexpected reference to the statute. See *ante* § 347.

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1. Either too many acres or too great an interest. And the same reasoning applies to contracts.

its express terms—does not apply to a suit for reformation because the reformation is only one means of enforcing the constructive trust: instead of having the deed corrected it would be usually equally effective to compel the defendant to convey back the excess. This is the rule practically everywhere.[2]

But when by mistake the deed has conveyed too little, or when the written contract for the conveyance describes less than did the real bargain,[3] there is a minority of states in this country that refuse to correct the error if the evidence of such error is oral. In Glass v. Hulbert[4] the plaintiff asked to have a deed so reformed as to include a portion of land that had been orally bargained for but was omitted by mistake. The court refused relief on the ground that as to the omitted tract the Statute of Frauds had no more been complied with than if there had been a separate oral contract for the omitted tract and the vendor had refused to convey, saying: "Such a reformation not only requires a description of the subject matter of the sale different from the express terms of the oral contract, but would enlarge the effect and operation of the deed as a conveyance. It involves the transfer of the legal title to land not covered by the deed already given. It requires a new deed to be executed and delivered by the defendant to the plaintiff. Whether that deed shall embrace the entire subject of the alleged contract of purchase, with a corrected description to make it conform to facts and

2. It is another criticism of the decision in May v. Platt that the reformation sought in that case was to limit the scope of the conveyance and hence the Statute of Frauds was clearly inapplicable; the defendant was not really asking for specific performance but to have a constructive trust declared as to whatever excess was conveyed by the deed. See *ante* § 348.

3. Davis v. Ely (1889) 104 N. C. 16, 10 S. E. 133; Macomber v. Peckham (1889) 16 R. I. 485, 17 Atl. 910.

4. (1819) 102 Mass. 24.

abuttals as they were represented to be, or merely convey the seventeen acres omitted from the deed already given, the order for its execution will enforce the specific performance of a contract for the sale of lands, for which there exists no memorandum, note or other evidence in writing signed by the party to be charged therewith. As to the seventeen acres in dispute, the obligation to convey them rests solely in the oral contract. The defendant denies any contract which includes them. The plaintiff seeks to establish such a contract by parol evidence and enforce it. The deed itself furnishes no means of making the correction sought for and no evidence of the contract relied on for this purpose: nor is it in any sense an acknowledgment of the substance of the alleged oral agreement."

§ 350. Same—prevailing American view.

By the great weight of authority in this country courts in reformation cases are not influenced any more by the Statute of Frauds than they are by the parol evidence rule, paying no attention to whether the scope of the contract or conveyance is sought to be enlarged or restricted. In Noel's Ex'r v. Gill[1] the court stated the majority view as follows: "Whether the parol evidence offered to correct the writing on account of fraud or mistake shows the verbal contract to be broader than the written instrument, covering more or a different subject matter, or enlarging the terms or is narrower than the written instrument, either in the terms or the subject matter of the contract, courts of equity will grant the relief by reforming the contract so as to prevent fraud or mistake. The Statute of Frauds, in granting such relief, is not violated, but 'is uplifted' that it may not perpetrate the fraud that the legislature designed it to prevent." And the court explains the origin and growth of the minority view thus: "The courts of the

1. (1886) 84 Ky. 241.

States that now put the most stress on this doctrine had no general equity jurisdiction, but only such limited equity jurisdiction as the statutes of the State[2] conferred upon them. A few other states, however, with general equity jurisdiction followed in the same line of thought."

As a matter of strict logic there is much to be said for the minority view;[3] especially in those jurisdictions which have rejected entirely or have a very limited doctrine of part performance as taking a suit for specific performance out of the operation of the Statute of Frauds.[4] But in those states which have a liberal part performance rule the fact that some conveyance or written contract has been made would seem to be quite as satisfactory a reason for "uplifting" the statute as the taking of possession by the purchaser or lessee.[5] In a state which holds the minority view but also has a part performance rule, reformation will, of course, be

2. The court has in mind Massachusetts and Maine.

3. In approval see 12 Col. Law Rev. 645. In Elder v. Elder (1833) 10 Me. 80, the court said: "A deed conveys one farm where it may be proved by parol that it should have conveyed two. Here equity cannot relieve without violating the statute. To do so would be to enforce a contract in relation to the farm omitted, without a memorandum in writing."

4. Massachusetts does have a limited doctrine and North Carolina has entirely repudiated it. See 1 Ames. Eq. Cas. 284-288.

5. In urging that reformation be regarded as a subject distinct from specific performance and not as merely an occasional means of giving specific performance the court in Conaway v. Gore (1880) 24 Kan. 389 said: "If a parol contract were sought to be enforced, the arguments and authorities of counsel would be in point. But the reformation of a deed already made,—the correction of a contract already in writing—involve very different considerations . . . It is not the substituting of acts in part for the written contract; but it is making the written the expression of the oral contract . . . The reformation implies the existence of a written contract. It corrects that which exists and does not seek to avoid the necessity of that which is not."

given if the purchaser or lessee has been placed in possession of the omitted premises.[6]

In jurisdictions which have adopted the prevailing view as to reforming land contracts, a similar rule prevails as to other sections of the Statute of Frauds and to other similar statutes. In Neininger v. State[7] the recognizance in a bastardy suit called the complainant Margie Hyne instead of Margie Cross; the State asked for reformation against the surety in the recognizance. The defence set up was that section of the Statute of Frauds relating to sureties, but the court held that since the Statute of Frauds was no bar to the reformation of land contracts and conveyances, it was equally no bar to reforming a contract as against a surety. In Hathaway v. Brady[8] action was brought on a note asking that the note be reformed by inserting "per month" after "2%." There was a statute requiring that agreements to pay more than 10 per cent be in writing, but the desired relief was given, the court saying: "The power of a court of equity to correct mistakes in contracts which the statute requires to be in writing—such as conveyances of real estate—and to permit such mistakes to be proved by parol evidence, is as well established as in cases where the contract is not required to be in writing. In fact, the greater class of cases in which this relief has been granted has been that of conveyances of real estate, which the law requires to be in writing."

§ 351. Statute of Wills.

It seems to be generally agreed that although courts of equity or of probate will go very far in construing

6. Metr. Lumber Co. v. Lake Sup. Ship Co., (1894) 101 Mich. 577; Beardsley v Duntley (1877) 69 N. Y. 577.

7. (1893) 50 O. St. 394, 34 N. E. 633.

8. (1863) 23 Cal. 121, 2 Ames Eq. Cas. 299;

wills where there is a mistake apparent on the face of the will,[1] they will give no relief where in order to make the will conform to the real intent of the testator they are compelled to give effect to extrinsic evidence of his intent by making it a part of the will.[2] Sometimes the reason given for denying reformation is that the persons seeking such relief are volunteers.[3] That this reason alone is not entirely adequate is shown by the fact that if by mistake a deed of gift does not convey as much as the donor intended and the donor is now dead, the intended donee may in many jurisdictions get reformation against the heirs or personal representatives of the donor.[4]

The reason more usually given is that of the court in Hunt v. White:[5] "It is not proposed to call in extrinsic evidence to enable the court to arrive at the meaning of the testator's language, used in the will itself, but to introduce into the will an intention not apparent upon its face, and different from that which the language used imports, by the proof of other language not contained in the will: in effect, to make a new devise for the testator, which he is supposed to have omitted, and not quite consistent with that he has made.

1. And in order to arrive at the meaning of the words of the will, they will admit extrinsic evidence. See Wigmore, Evidence §§ 2467, 2477.

2. There seems to be only one case where the court purported to reform a will. In Wood v. White (1850) 32 Me. 340 a bequest was corrected by substituting "George Wood" for "J. Wood;" but since the evidence showed that the testator had been accustomed to address letters to George Wood as J. Wood, it seems a case of interpretation rather than reformation.

3. 34 Cyc. 924; Sherwood v. Sherwood (1878) 45 Wis. 757. Of course a devisee or legatee is not always a volunteer; but if the testator had made a prior contract to devise to the plaintiff, it would be treated substantially like other specific performance cases. See *ante* § 89.

4. See *ante* § 344.

5. (1860) 24 Tex. 643.

The effect of the admission of such evidence would be that the will, though made and executed with the requisite legal solemnities by the testator in his life-time, would really and in fact be made by the witnesses after his death. It is unnecessary to advert to the danger of admitting such evidence. It is sufficient that there is no authority for it in the law; that it would destroy all the guards intended to be secured by the statute of frauds, and the statute concerning wills, for the prevention of frauds and perjuries; and the statute would contravene the clearest and best established principles and rules of law."

This second reason by itself can hardly be deemed conclusive, because there is no apparent reason way courts of equity might not just as well have "uplifted" the statutes with reference to wills as the statutes relating to deeds and contracts, with the same safeguard of requiring clear, convincing proof of the mistake. The real explanation of the flat rule denying relief seems to be that at the time that equity was acquiring its jurisdiction of rectification, wills were under the jurisdiction of the ecclesiastical courts: and when later courts of equity might have extended their jurisdiction they were in a more conservative mood and perhaps felt bound by their tradition of non-interference. The rule is now so thoroughly settled that a statute would be necessary to change it.

§ 352. Amount of proof required.

In giving reformation equity courts are nearly always compelled to disregard either the parol evidence rule of the Statute of Frauds or both; they therefore require as a counterbalance that the mistakes be proved by more than a mere preponderance of the evidence.[1] Thus it has been said that "the proof must be of the

1. Leslie v. O'Neil (1913) 108 Ark. 607, 156 S. W. 1017.

most convincing character'"[2]; that it must be "clear, strong and satisfactory'"[3]; that "the evidence must be clear, unequivocal and decisive, not evidence which hangs equal or nearly *equilibrio.*"[4] In a few cases the phrase "beyond a reasonable doubt" has been used, but in Southard v. Curley[5] it was held, after considering a great many cases, that it was not error to refuse to charge that "the burden of proof is on the defendant to satisfy the jury beyond a reasonable doubt that there was a mutual mistake" on the ground that the courts which had used the phrase had not meant it in the technical sense of the criminal law. It would seem that the question is largely an academic one since in the great bulk of reformation cases there is no jury trial and the difference in the phrases discussed above is not likely to have much influence on a court.

F. Relief for and Against Third Persons.

§ 353. Analogy to other equities.

In general the equity of reformation, like the equity of specific performance[1] is freely assignable by the owner. The most usual case of assignment occurs where the mistake is repeated in later transactions. In Cole v. Fickett[2] A bargained to convey lots X and Y to B; by mistake of the scrivener the deed described only X. B went into possession of both lots and later sold them to the plaintiff, but the conveyance repeated the original mistake. B put the plaintiff in possession of both lots. The plaintiff was entitled to reformation because his bargain with B for lot Y not only created an equitable right to the lot as against B, but since an equity court

2. Park Bros. v. Blodgett Ins. Co. (1894) 64 Conn. 28, 29 Atl. 133.
3. Altro v. Gowland (1904) 90 N. Y. Supp. 796.
4. U. S. v. Munroe (1830) 5 Mason 572.
5. (1892) 134 N. Y. 148, 31 N. E. 330.

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1. See *ante* § 82.
2. (1901) 95 Me. 265, 49 Atl. 1066, 2 Ames Eq. Cas. 178. See *ante* § 333.

is always ready to do complete justice wherever possible, the bargain entitles him to have all previous mistakes corrected.[3] If the mistake had been discovered before the bargain and the conveyance to the plaintiff, it would ordinarily require an express assignment of the equity; a mere conveyance of lot X would in such a case not be sufficient.[4]

Like other equities, reformation may be had against all but bona fide purchasers for value,[5] including devisees,[6] attaching creditors,[7] judgment creditors and purchasers with notice[8] and beneficiaries of a life insurance policy.[9]

§ 354. Reformation against a married woman.

At common law a married woman could not make a binding contract and therefore specific performance could not be enforced against her.[1] She could, however, convey her land by a deed in which her husband joined. If such a deed should be reformed it would, therefore, be

3. Altho in substance the bargain is an assignment of B's equity of reformation to the plaintiff, B. himself may still sue for reformation. Tillis v. Smith (1895) 108 Ala. 264, 19 So. 374.

4. See dictum in Blackburn v. Randolph (1878) 33 Ark. 119, 2 Ames Eq. Cas. 183.

5. That it is not enforcible against a bona-fide purchaser, see Seeley v. Brumble (1862) 6 Jones (N. C.) 295.

6. Christman v. Colbert (1885) 33 Minn. 509, 24 N. W. 301.

7. Bullock v. Whipp (1885) 15 R. I. 195, 2 Atl. 309.

8. Berry, Demoville & Co. v. Sowell (1882) 72 Ala. 14. In Citizens' National Bank v. Judy (1896) 146 Md. 322, 43 N. E. 259, a peculiar distinction was taken. In a mortgage given to secure a pre-existing debt some land was omitted by mistake. It was held that tho a pre-existing debt was not such consideration as to cut off prior equities yet the mortgagee was entitled to reformation as against subsequent purchasers or judgment creditors with notice.

9. Gray v. Supreme Lodge, Knights of Honor (1888) 118 Ind. 293, 20 N. E. 833.

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1. See *ante* § 179.

another instance of a specific equity of reformation[2] as distinguished from reformation as a means of giving specific performance. Where the mistake has consisted of an error in the description of the property[3] or in the omission of the name of the husband or wife from the body of the deed,[4] there has been a tendency to give relief. But where the deed is defective because the husband has not been joined in the deed relief has been denied.[5] The question has now become largely academic because of legislation making the married women capable of binding themselves by contract.

G. Plaintiff's Conduct as a Defense.

§ 355. Lapse of time.

The effect of lapse of time upon a suit for reformation varies much according to circumstances. If the plaintiff has all the time been in undisturbed possession of the tract which was mistakenly omitted from the conveyance, no length of delay will bar him.[1] In

2. See *post* § 360.

3. In Hamar v. Medsker (1878) 60 Ind. 413, 2 Ames Eq. Cas. 228 the court said, in giving relief: "A deed has been executed by the wife, in conjunction with her husband, for the land intended to be conveyed. This satisfies the requirement of the statute, and the title of the purchaser ought not to be defeated by the mistake in the description of the land intended to be thereby conveyed." See *contra*, McReynolds v. Grubb (1899) 150 Mo. 352, 363.

4. Parish v. Camplin (1894) 139 Ind. 1, 37 N. E. 607. In Cannon v. Beatty (1897) 19 R. I. 524, 34 Atl. 1111 the decision *contra* seemed to be based upon the court's notion that such an omission was a failure to comply with a statutory requirement.

5. Gebb v. Rose (1874) 40 Md. 387. Much emphasis was laid upon the fact that a statute required the husband to join.

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1. Wykle v. Bartholomew (1913) 258 Ill. 358, 101 N. E. 597; Ruckerman v. Cory (1888) 129 U. S. 387: "Laches are rather to be imputed to the defendant who, although claiming to have been the absolute owner of the lands since 1862, took no action against the plaintiff till this ejectment suit was instituted."

cases where the statute of limitations is applied by way of analogy, the statutory period is usually considered as beginning when the plaintiff found out the mistake or could have discovered it by the exercise of ordinary care.[2] In applying the equitable doctrine of laches the courts in reformation cases as in other equity cases will take into consideration the entire facts of the case in determining whether, on the whole, the delay of the plaintiff has been such as to render the giving of reformation inequitable to the defendant.[3] Unreasonable delay, independently of any statute of limitations, constitutes a defence in a court of equity.[4]

§ 356. Negligence in failing to discover mistake.

It seems to be assumed as well settled that a plaintiff may be barred from reformation because of his failure to detect the mistake in the instrument. Cases where this was the controlling factor seem to be rare,[1] but there are many cases where it is one of several factors in causing the denial of relief.[2] On the other

2. Breen v. Donnelly (1887) 74 Col. 301, 15 Pac. 845. Duvall v. Simpson (1894) 53 Kan. 291, 36 Pac. 330, 2 Ames Equity Cases 311 note.

3. In Sable v. Maloney (1880) 48 Wis. 331, 4 N. W. 479, 2 Ames Eq. Cas. 310, the plaintiff failed because of delay and acquiescence for fifteen years. In Daggett v. Ayer (1888) 65 N. H. 82, 18 Atl. 169, 2 Ames Eq. Cas. 232, the mistake was discovered in 1871 but suit was not brought till 1883; this delay was one of the grounds for refusing relief. In Bloomer v. Spittle (1872) L. R. 13 Eq. 427, 2 Ames Eq. Cas. 309, a delay of four years was an element in inducing the court to give the option to the defendant of rescission instead of reformation. See 2 Ames Eq. Cas. 311 note for collection of cases where relief was granted after long delay.

4. Sable v. Maloney (1880) 48 Wis. 331, 4 N. W. 479, 2 Ames Eq. Cas. 310.

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1. Eldridge v. Dexter etc. R. R. Co. (1895) 88 Me. 191, 33 Atl. 974 (failure to read a deed). There are several rescission cases on the point. See Brown v. Fagan (1880) 71 Mo. 513. See *post* § 377.

2. See Bloomer v. Spittle (1872) L. R. 13 Eq. 472, 2 Ames Eq. Cas. 309; "It is the bounden duty of the purchaser, when he pur-

hand the influence of the plaintiff's failure may be neutralized or overcome by other circumstances, such as the plaintiff's illiteracy[3] or the nature of the instrument in which the mistake occurred.[4] If the defendant has acted fraudulently in the performance of the oral bargain or in reducing it to writing,[5] the plaintiff's failure to discover the error should ordinarily not bar relief.[6]

§ 357. Fraud on third persons—illegality.

In Tabor v. Cilley[1] the plaintiff mortgagee asked to have his mortgage reformed so as to include four notes which he alleged were omitted by mistake. One ground for denying relief was that the plaintiff[2] had the mortgage so drawn as to lull the other creditors into security and avoid proceedings in insolvency. It does not appear whether there was a prior agreement to secure the omitted notes; if there were such prior agreement the plaintiff was properly barred by his fraudulent conduct from what would otherwise be a clear right to reformation. If there were no such

chases land, to look at his conveyances and see what it is that he has got."

3. Kinney v. Ensminger (1888) 87 Ala. 340, 6 So. 72.

4. In Palmer v. Hartford Insurance Co. (1887) 54 Conn. 488, 9 Atl. 248, the failure of the plaintiff to read over a fire insurance policy was held to be no bar to reformation even after loss occurred.

5. See *ante* § 338.

6. Hitchins v. Pettingill (1876) 58 N. H. 3, 2 Ames Eq. Cas. 307. The court laid no particular emphasis on the fraud, however. "The rule caveat emptor applies to the making of the contract of purchase, the negotiations, the agreement, the inducements upon which the minds of the parties met, but not to the formal clerical process of giving the purchaser written evidence of the completed bargain." See also Ward v. Spelts (1894) 39 Neb. 809, 58 N. W. 426; Albany City Saving Inst'n. v. Burdick (1881) 87 N. Y. 40.

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1. (1881) 53 Vt. 487, 2 Ames Eq. Cas., 231.

2. The language of the court indicates that the plaintiff at least shared this fraudulent intent.

prior agreement the mortgagee's right—as has been already pointed out[3]—is merely against the mortgagor and not against other creditors.

In Henderson v. Dickey,[4] the defendant's ancestor had conveyed lot "H" to "W", the plaintiff's assignor, omitting lot "E" by mistake; reformation was sought but refused on the ground that W's husband had conveyed lots "H" and "E" to T in fraud of the grantee's creditors. It would seem, however, that the creditors would be entitled to reformation.

That the transaction was tainted with illegality may bar reformation. In Hawkins v. Pearson[5] the plaintiff asked to have a mortgage reformed but relief was denied because it appeared that there was usury in the mortage contract and the plaintiff had not offered to do equity in releasing his claim to all interest on the debt.

§ 358. Compromise.

If there is a doubtful question of either fact or law and a compromise is fairly entered into, the social interest in the security of transactions demands that the compromise shall stand. In Naylor v. Winch[1] the court said: "If a party acting in ignorance of a plain and settled principle of law is induced to give up a portion of his indisputable property to another under the name of compromise, a court of equity will relieve him from the effects of his mistake. But where a doubtful question arises, such as the question of construction upon the will of the testator, it is extremely reasonable that parties should terminate their differences by dividing the stake between them in the proportions which may

3. See *ante* § 343.
4. (1864) 35 Mo. 120, 2 Ames Eq. Cas. 185.
5. (1892) 96 Ala. 369, 11 So. 304.

1. (1824) 1. Simons & Stuart Ch. 555.

be agreed upon . . . It is enough to support this deed, that there was a doubtful question and a compromise fairly and deliberately made upon consideration: and the actual rights of the parties, whatever they might be, cannot affect the question.'"[2]

§ 359. Ratification—election of remedies.

If the plaintiff has ratified the mistake it is too late to ask for reformation.[1] Such ratification sometimes consists in having brought an action at law upon the basis of the uncorrected instrument. In Washburn v. Great Western Ins. Co.,[2] the plaintiff asked to have an insurance policy reformed by striking out a printed clause of warranty. In defense it was shown that the plaintiff had already sued at law alleging compliance with the warranty and had failed. In denying relief the court said: "His bill . . . proceeds on grounds wholly inconsistent with those maintained by him in the action at law, and seeks to show that his contract with the defendants was essentially different from that which he alleged, and submitted to the final judgment of the court in that action . . . Any decisive act of the party, with a knowledge of his rights and of the fact, determines his election, in the case of conflicting and inconsistent remedies."[3]

H. MISCELLANEOUS.

§ 360. Reformation as an independent equity.

In a large number of cases where reformation is granted the plaintiff has either a right to specific performance or a right to have a constructive trust de-

2. See also Rogers v. Ingham (1876) L. R. 3 Ch. D. 351.

1. Rogers v. Ingham (1876) 3 Ch. D. 351.

2. (1873) 114 Mass. 175.

3. See also Steinbach v. Relief Fire Ins. Co. (1879) 77 N. Y. 493; Caird v. Moss. (1886) 33 Ch. D. 22.

clared;[1] and in some jurisdictions there has been a tendency to consider reformation as a mere means of enforcing such other equities.[2]

There are, however, several instances in which equity has recognized a distinct and independent equity of reformation, some of which have already been discussed. A wife may have as against her husband reformation of a voluntary deed[3] tho she could not get specific performance of a voluntary promise to provide for her. Similarly, a creditor may get reformation against his debtor of an instrument executed by way of security or payment of a pre-existing debt, tho he could not have compelled the execution of the instrument.[4] In some jurisdictions a mere volunteer may get reformation against the representatives of a deceased donor.[5] Under the prevailing American view of the effect of the statute of frauds, a deed which conveys too little will be reformed so as to convey the omitted part[6] tho the sole evidence of the error is oral, and the plaintiff would be without remedy if no deed whatever had been executed. And lastly, equity will reform a note[7] or bond[8] where of course no question of specific performance or of constructive trust could possibly arise.

1. In Cole v. Ficket (1901) 95 Me. 265, 49 Atl. 1066, 2 Ames Eq. Cas. 178, one deed conveyed too little and another conveyed too much; hence both specific performance and constructive trust are involved.

2. This is usually the position taken in those jurisdictions that refuse to give effect to oral evidence to enlarge the effect of a deed or contract. Davis v. Ely (1889) 104 N. C. 16, 10 S. E. 138, discussed in § 349 *ante*.

3. See *ante* § 343.

4. See *ante* § 343.

5. See *ante* § 344.

6. See *ante* § 350.

7. Hathaway v. Brady (1863) 23 Cal. 121, 2 Ames Eq. Cas. 299.

8. Griswold v. Hazard (1891) 141 U. S. 260, 2 Ames Eq. Cas. 259.

§ 361. Form of relief.

If by mistake a deed conveys too much an effective way of rectifying the mistake is to compel the grantee to reconvey the excess;[1] or if the deed conveys too little, to compel the grantor to convey the omitted part,[2] or to have the old deed changed and then re-executed by the grantor. Merely changing the old deed under order of court, whether the deed conveys too much or too little or needs alteration in other respects—is effective only if the equity court assumes the power to give an *in rem* effect to its decrees.[3] It is interesting to note that courts have sometimes done this.[4] In some cases such a power is necessary in order to give complete relief and should be provided for by statute if a court feels prevented by precedent; for example, if the party against whom relief is sought is an infant,[5] or is otherwise incapable of executing the conveyance or contract. As a practical matter, if the property involved is within the jurisdiction of the court, the mere correction of the instrument may be made effective by enjoining[6] the defendant from interfering with the property.

1. As in Andrews v. Andrews (1889) 81 Me. 337, 17 Atl. 166. See also Brown v. Lamphear (1862) 35 Vt. 252, 2 Ames Eq. Cas. 203 where a reservation of a water right was omitted.

2. Hitchins v. Pettengill (1876) 58 N. H. 3; 2 Ames Eq. Cas. 307.

3. In Malmesbury v. Malmesbury (1862) 31 Beav. 407 the court refused to do this and required a re-execution.

4. In Stock v. Vining (1858) 25 Beav. 235, the court merely ordered stricken out the words erroneously introduced into the marriage settlement, added his initials, and ordered his decree to be endorsed on the instrument. The procedure was similar in Smith v. Illiffe (1875) L. R. 20 Eq. Cas. 666.

5. White v. White (1872) L. R. 15 Eq. Cas. 247, 2 Ames Eq. Cas. 235.

6. An injunction was used as a means of rectification of a bond in Griswold v. Hazard (1891) 141 U. S. 260, 2 Ames Eq. Cas. 259: (bill to reform bond so as to make sureties liable merely for appearance of debtor and not for performance of decree; since the debtor was dead, re-execution of the bond was impossible, so an injunction

§ 362. Execution sales—statutory formalities—foreclosure of mortgage.

In Young v. McGown[1] the plaintiff asked for reformation of a levy which by mistake described the property of X instead of that of the judgment debtor, asking that the defendant be compelled to convey to him the land intended to be levied upon. The court's denial of relief was placed upon several grounds. One was that the proceedings were *in invitum*, the mistake was entirely that of the creditor or sheriff, not of the debtor and therefore there should be no reformation as against the latter. Since a donor who has conveyed too much may get reformation to his own intent against the donee[2] who would otherwise be unjustly enriched, it is difficult to see why the fact that the judgment debtor has no intent in the matter should prevent the judgment creditor from getting reformation to his intent against a debtor[3] who may otherwise escape the payment of his debt. A somewhat sounder basis[4] for the decision is that the proceedings were under a statute which required particular formalities, there being a tendency to hold that such statutes are binding in equity as at law.[5] The proper remedy in Young v.

was given against suit on the bond). See also Waldron v. Letson (1862) 15 N. J. 126, 2 Ames Eq. Cas. 223 where reformation of a foreclosed mortgage was effected by an injunction.

1. (1873) 62 Me. 56, 2 Ames Eq. Cas. 247.

2. See *ante* § 342.

3. Oddly enough, the court mentions the fact that a donee cannot get reformation against a donor as if they considered such a situation analogous. It is difficult to see any analogy.

4. The third ground given by the court was the negligence of the plaintiff in making the mistake. See *ante* § 356. The fourth was that to give relief "would render the registry of deeds of little value." The answer to the fourth ground is that like other equities, reformation will not be enforced against one who has relied on the registry. See *ante* § 353.

5. *Ex parte* Bulteel (1790) 2 Cox Eq. 243 (mortgage of ship failed

McGown was to move the court to grant the officer leave to amend his return.

In Waldron v. Letson[6] a mortgage omitted by mistake a lot of land used in connection with a tanyard. The mortgage was later foreclosed and the premises sold to the plaintiff who went into possession of the omitted premises. The mortgagor's son sued in ejectment and the equity plaintiff sued to reform the mortgage and the sheriff's deed. The court said that they could not give reformation because the sheriff's deed[7] corresponded to the mortgage and the mortgage could not be reformed because it had been extinguished by the decree; but the court gave exactly equivalent relief by an injunction against the law plaintiff. The decision is to be commended because the mortgagor had evidently received the value of the omitted premises and the equity plaintiff apparently had no other remedy. If the land had been mistakenly advertised so that the purchaser did not think he was buying the omitted tract, the foreclosure and sale should be set aside, the mortgage reformed and a new foreclosure and sale ordered.[8]

to comply with Ship Registry Act). This is certainly justifiable if the Statute provides a way of correcting the error as in Hall v. Klepzig (1889) 99 Mo. 83, 12 S. W. 372 (incomplete execution of sheriff's deed). See also Rogers v. Abbott (1871) 37 Ind. 220.

6. (1862) 15 N. J. Eq. 126, 2 Ames Eq. Cas. 223.

7. In some states there is reluctance to reform a sheriff's deed on foreclosure on the ground that the statute requiring certain formalities is binding on equity courts. Armstrong v. Short (1883) 86 Ind. 81; but in other jurisdictions reformation is freely given; Quivey v. Parker (1859) 37 Col. 165: "But it is said that mortgage cannot now be reformed, because it has become merged in the judgment of foreclosure, and that it is not competent for a court of equity to reform the judgment and the sheriff's deed. We have been referred to no authorities in support of this proposition, and, on principles of reason and justice, we do not perceive why a court of equity may not reform mistake, in judgments or decrees, in like manner as in written instruments."

8. Conyers v. Mericles (1881) 75 Ind. 443. A similar situation is presented where there is no mistake in the mortgage but the foreclosure proceedings fail to describe the right land. Unless there is a common law or statutory method of correcting the error, equity should either reform or set aside the foreclosure depending upon whether the sale had been at a fair price for the mortgaged land. See 25 Harv. Law Rev. 478.

CHAPTER VII.

RESCISSION.

A. In General.

§ 363. Rescission distinguished from reformation.

The main distinction between reformation and rescission,[1] as has already been pointed out,[2] is that reformation is an affirmance of the bargain[3] as it was actually made, while rescission is a disaffirmance of the bargain itself. In order that reformation may be given there must have been a previous agreement[4] which the court may use as a standard for the correction of the erroneous instrument; in order that there be rescission such previous agreement is not only unnecessary but its existence would ordinarily prevent rescission.[5]

The effect of reformation, therefore, is to rectify the transaction, while rescission cuts off or removes the attacked transaction leaving the parties in the same position as they were before such transaction took place.[6]

§ 364. Rescission in equity and at law.

Reformation of instruments is exclusively a matter of equity jurisdiction.[1] And so is rescission where it is

1. Literally the word means a cutting away, a removal.
2. See *ante* § 337.
3. In unilateral transactions, an affirmance of the donor's intent.
4. In unliteral transaction, a previous intent of the donor.
5. See *ante* § 337.
6. Except in reinstatement case, see post § 367, 372, the parties are left without any affirmative legal relations.

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1. See *ante* § 331.

desired to have instruments cancelled or where for other reasons it is necessary to have the court issue a command to the defendant in order to obtain adequate relief. In other cases, the principles of rescission have been adopted at common law[2] so that in such cases it is not only unnecessary to go into equity but equity courts will frequently refuse to take jurisdiction because of the adequancy of the remedy at law. The bulk of this chapter will therefore deal with the rescission of instruments, tho some of the cases discussed will be common law cases decided upon equitable principles of rescission.

§ 365. Rescission and specicific performance.

As already pointed out,[1] a court may refuse specific performance to one party to a transaction and at the same time refuse rescission to the other. In other words it requires a stronger case of mistake, misrepresentation, etc., to induce a court to give affirmative relief by way of rescission than it requires merely to deny specific performance. This leaves a neutral zone in which neither party can get equitable relief, each being left to whatever remedy he may have at law.

B. Mistake.

§ 366. Intrinsic and extrinsic or collateral facts.

Gnerally speaking reformation is properly given only where the mistake is in the expression or in the performance of the real transaction;[1] rescission lies

2. For rescission in the sale of chattels, see Williston, Sales §§ 655, 656.

1. See *ante* § 156; and see Bates v. Delavan (1835) 5 Paige 299.

1. "A mistake which justifies reformation is one that occurs, not in the bargain itself, but subsequent to the bargain; it is a mistake in reducing to writing the contract of the parties;" 60 U. of Pa. Law Rev. 589. See *ante* § 333.

where the mistake is other than in the expression or performance. In order that mistake shall be ground for rescission it must, of course, be a mistake as to a material matter.[2] In addition to this there seems to be a requirement that the mistake must be as to something intrinsic such as mistake as to the existence of the subject matter of the transaction. If the mistake is as to something extrinsic or collateral such as the quality or characteristic of such subject matter rescission is refused. In Sample v. Bridgeforth[3] an action was brought on a note against the maker and indorser; the indorser showed that the parties to the sale of the note mistakenly thought that the note was secured by a first trust deed on the maker's stock. In denying the validity of this defense the court said: "They both mistook an important fact, collateral to the transaction. They thought the note, so bought and sold, was secured by a first trust deed on the maker's stock; and they were both innocently mistaken. . . . The defendant acquired exactly what he intended to get but what he would not have purchased if he had been fully informed. . . . It is well settled that this will not afford ground for a rescission of the contract."

Assuming the line of division between intrinsic and collateral it is sometimes difficult to tell where the line should be drawn because it is not always easy to separate an article from its attributes. In Hecht v. Batcheller[4] the defendant sold a note to the plaintiff; two hours before the sale the makers of the note had made a general assignment for the benefit of creditors. Plaintiff sued in quasi contract to recover back the amount paid. In denying relief: "The makers of the note had made an assignment for the benefit of their

2. See *ante* § 365.

3. (1894) 72 Miss. 293, 16 So. 876, 2 Ames Eq. Cas. 207; Kowalke v. Milwaukee Elec. Light Co. (1899) 103 Wis. 472, 79 N. W. 762 (release of action for personal injuries given while plaintiff mistakenly thought she was not pregnant).

4. (1888) 147 Mass. 335, 17 N. E. 651; 2 Ames Eq. Cas. 212.

creditors, but this did not extinguish the note or destroy its identity. It remained an existing note, capable of being enforced, with every essential attribute going to its nature as a note which it had before. Its quality and value were impaired but not its identity. The parties bought and sold what they intended and their mistake was not as to the subject matter of the sale but as to its quality.'"[5]

It might well have been urged in the foregoing case that the business understanding of the parties was that the subject matter of the sale was not merely a note but a commercial instrument and that there was no longer a commercial instrument after the general assignment; similarly, in Sample v. Bridgeforth it might have been urged that the business understanding was that the note assigned was a secured note. Such an argument is especially cogent in cases like the foregoing where the quality involved is much more important than the note itself. It would seem, therefore, that instead of applying the test of intrinsic or collateral mechanically it would be better either to apply it so as to make it accord with business understanding or so to modify the rule as to provide that mistakes of characteristics or quality be ground for rescission if so important as to go to the root of the transaction.[6]

5. In Dambman v. Schulting (1878) 75 N. Y. 55 the plaintiff had given for $5,000 a release under seal of his claim for $10,000 against the defendant, mistakenly supposing that the defendant was insolvent. Rescission was refused because the defendant's financial condition was considered to be an extrinsic fact.

6. In a few cases relief has been given in accordance with this suggestion. In Sherwood v. Walker (1887) 66 Mich. 568, 33 N. W. 919 the defendant contracted to sell for about $80 a cow which both parties supposed to be barren; when the defendant later found out that the cow was with calf he refused to deliver her; the plaintiff brought replevin. In holding that the defendant was entitled to rescind the sale the court said: "The mistake or misapprehension of the parties went to the whole substance of the agreement. If the cow was a breeder she was worth at least $750; if barren, she was not worth over $80 . . . It is true that she is now the identical animal that they thought her to be when the contract was made;

§ 367. Mutual mistake.

In order to obtain rescission for mistake in bilateral transactions it is necessary to show either (1) that the mistake was mutual or common to both parties; or (2) that the defendant innocently caused the plaintiff's mistake; or (3) that the defendant was cognizant of the plaintiff's mistake; or (4) that the parties misunderstood each other. If the plaintiff alone was mistaken and the defendant did not cause the mistake and did not know of it, rescission is ordinarily refused.

It is well settled that mutual mistake as to the existence of the subject matter of the transaction is ground for rescission. In Riegel v. American Life Ins. Co.,[1] the plaintiff had taken out a policy of $6000 on the life of his debtor L; later he surrendered the policy in exchange for a paid up policy of $2500, both parties acting upon the assumption that L was still alive. The plaintiff asked for and was awarded cancellation of the new policy and a reinstatement of the old on the ground that the basis of the transaction was the then existence of L and that since L had already died and the old policy had become due, the plaintiff was entitled to be restored to his former position.[2]

there is no mistake as to the identity of the creature, yet the mistake was not the mere quality of the animal but went to the very nature of the thing." See also Griffith v. Sebastian Co. (1886) 49 Ark. 24, 3 S. W. 886; rescission was given of a conveyance of land tho the mistake was as to a collateral matter, namely, as to whether the county seat had been moved.

1. (1893) 153 Pa. St. 134, 25 Atl. 1070.

2. See also Scott v. Coulson (1903) L. R. 2 Ch. D. 249, 2 Ames Eq. Cas. 195. In that case the plaintiff assigned to the defendant a policy of insurance on the life of D; at the time of the contract both parties mistakenly thought that D was alive but the defendant knew the truth at the time of the assignment. Even if the defendant had not found out the fact the plaintiff would have equally been entitled to a rescission. In Gould v. Emerson (1894) 160 Mass. 438, 35 N. E. 1065, the plaintiff being indebted to the amount of $10,000 to his partnership in the settlement of affairs, gave a note for that amount to his partner the defendant, instead of giving the note to the

Mutual mistake as to the ownership of the subject matter of the transaction is equally ground for rescission. In Hitchcock v. Giddings[3] the defendant thinking that he had an estate tail in certain land contracted to sell half of it to the plaintiff for £5000; later he executed a conveyance of it and the plaintiff having given a bond, paid £250 interest. The entail had already been barred. In awarding to the plaintiff cancellation of the bond and the return of the £250 the court said: "Suppose I sell an estate innocently, which at the time is actually swept away by a flood, without my knowledge of the fact; am I to be allowed to receive £5000 and interest because the conveyance is executed and a bond given for that sum as the purchase money, when, in point of fact I had not an inch of the land, so sold, to sell? That was precisely the case with the present defendant; and it would be hard, indeed, if a court of equity could not interfere to relieve the purchaser.[4]

§ 368. Plaintiff's mistake innocently caused by the defendant.

Whether the defendant himself is mistaken[1] or not, if he has innocently caused the plaintiff to make an intrinsic mistake the plaintiff is entitled to rescission.

firm or making the note to the defendant $5,000 in amount. Recission was granted tho he had paid $6,000 on the note.

3. (1817) 4 Price 135, 2 Ames Eq. Cas. 192. As to risk of loss by fire, see *ante* § 119.

4. See also Turner v. Turner (1680) 2 Reports in Ch. 154, 2 Ames Eq. Cas. 263, where rescission was given to a plaintiff who supposed that he was not entitled, as executor, to a mortgage held by his testator.

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1. If the defendant, being himself mistaken, has caused the plaintiff's mistake, it makes even a stronger case for rescission than the ordinary case of mutual mistake. In Bingham v. Bingham (1748) 1 Ves. Sr. 126, 2 Ames Eq. Cas. 264, J. B. conveyed by will to his eldest son D in tail, remainder in fee to J. B.'s own heirs. D died without issue and left the estate to the plaintiff in fee. The

In Torrance v. Bolton[2] the plaintiff bought land at an auction thinking it was free from incumbrances. There is nothing to show that the mistake was shared[3] by the defendant, but rescission was given because the plaintiff's error was brought about by the ambiguous way in which the property was advertised for sale.

§ 369. Defendant cognizant of the plaintiff's mistake.

A defendant who at the time of the transaction is aware that the plaintiff is acting under a mistake is certainly in no stronger position to resist a decree of rescission than if he had shared in the mistake; in fact it is a stronger case for rescission because the defendant's conduct in such a case is fraudulent. In Haviland v. Willets[1] the plaintiff did not know the rule in the law of wills that if a legatee dies before the testator his legacy lapses and does not go to his representatives; supposing, therefore, that he was not entitled to the lapsed legacy he made a settlement of his rights under the will on that basis. The defendant at first shared his mistake but discovered the truth before the transaction was entered into. In giving rescission the court laid emphasis upon the defendant's fraud in thus taking advantage of the plaintiff's mistake.[2]

defendant erroneously persuaded the plaintiff that D could not devise in fee and induced the plaintiff to buy the estate for £80; rescission was given. See also Gee v. Spencer (1681) 1 Vernon 32.

2. (1872) L. R. 14 Eq. Cas. 124.

3. The court called it a common mistake but the facts given do not justify it. The difference is, however, of no legal importance here.

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1. (1894) 141 N. Y. 35; 2 Ames Eq. Cas. 273.

2. See also Broughton v. Hutt (1858) 3 De Gex and Jones 501 (plaintiff thought that shares in a land company were realty and defendant knew that the plaintiff was mistaken); Paget v. Marshall (1884) 28 Ch. Div. 255 (defendant knew that the plaintiff had mistakenly included too much in a lease).

§ 370. Misunderstandings.

If the written instrument does not correspond with the actual intent of either party thereto, but each party has made a different mistake, the situation has been called a misunderstanding.[1] It is impossible, of course, to give reformation because there is no previous agreement by which the written instrument may be rectified.[2] And since the instrument does not correspond with the intent of either party it can not be regarded as the agreement even at law;[3] hence in cancelling the instrument equity is really enforcing the common law.

In Crowe v. Lewin,[4] the defendants thought they were conveying X which they owned, whereas the deed described Y which they did not own; the plaintiff expected to get Y but supposed that the defendants owned it. The plaintiff sought rescission and return of the land he had conveyed to the defendants. In holding it proper to give the relief sought, the court said: "In this case the minds of the parties never met. The contract in form was not a contract in fact.

1. See 11 Col. Law Rev. 208, 320, 321. The article mentions two other kinds of misunderstandings: (1) where the offer and acceptance apparently agree but there is an equivocation because of which the minds do not meet; (2) where the offeree performs or attempts to perform upon a misapprehension of the terms of the offer. The leading case of (1) is Raffles v. Wichelaus (1864) 2 H. & C. 906; the parties agreed to buy and sell cotton to arrive "ex Peerless from Bombay." There were two ships of that name sailing from the same port at different times; each party had in mind a different ship and apparently did not know of the existence of the other. Since the language equally applied to both ships neither party could insist upon having it construed according to his understanding and hence there was no contract. Since neither party asked for cancellation or any other equitable relief, the question was litigated and decided at law.

2. See *ante* § 339.

3. At common law even where the parol evidence rule does not apply, the test applied is objective rather than subjective; in determining the existence of a contract the test is not whether there was an actual meeting of the minds but whether there was an expression of mutual assent.

4. (1884) 95 N. Y. 423.

It originated in mistake and that mistake was not mutual and about the same thing, but different on the part of each. . . . The defendants' mistake was that they conveyed what they did not own and did not mean to sell. The plaintiff's was that he bought what he meant to buy but without the asserted title in his grantors. What one meant to sell the other did not mean to buy and what one meant to buy the other did not mean to sell."[5]

§ 371. Plaintiff alone mistaken—defendant innocent.

If the plaintiff alone was mistaken—the defendant neither causing the mistake nor being cognizant of it—equity will ordinarily not give him affirmative relief[1] on the ground that it would be unfair to deprive an innocent defendant of the benefit of the transaction. On the other hand, it may be argued for the plaintiff that equity should relieve him from a transaction which he did not really intend to make, at least if compensation be made to the defendant for the damage actually suffered[2] by having entered into the transaction. Such is the doctrine of the civil law[3] and it has apparently been substantially adopted in Califor-

5. See also Clowes v. Higginson (1813) 1 V. & B. 526: "In such a case . . . the one not intending to sell what the other meant to buy the court, feeling the injustice of giving to either a performance upon terms to which the other never agreed has come to the conclusion that there is no contract between them; that they did not rightly understand each other; and therefore it is not possible without consent to compel either to take what the other has offered."

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1. Moffett & Co. v. City of Rochester (1898) 91 Fed. 28; 18 Harv. Law Rev. 624. And specific performance will usually not be decreed against him; see *ante* § 162.

2. Not usually including the loss of the bargain but merely such as to place the defendant in *statu quo*.

3. The doctrine is called "*culpa in contrahendo*," i. e. fault in connection with the making of a contract.

nia by statute.[4] In Goodrich v. Lathrop[5] the plaintiff, knowing that the defendant had a certain lot for sale went to examine it with a view to purchase but by mistake looked at a different lot from the one the defendant had for sale. Being satisfied with the one she examined she entered into a written contract with the defendant to buy it; upon finding out her error she gave notice of rescission and sued to recover back the money she had paid under the contract. The court held that if the property could be returned by the vendee in substantially the same condition as when he received it, rescission could be granted under the code, awarding proper compensation to the defendant.

§ 372. Rescission of unilateral transactions.

If the erroneous transaction was such as to involve the act of the plaintiff only and the effect of the transaction would be the unjust enrichment of the defendant, the plaintiff is entitled to have the transaction rescinded tho he was the only party mistaken. In Banta v. Vreeland[1] the plaintiff mortgagee cancelled the mortgage thinking that the mortgage debt had been satisfied; he now seeks to have the mortgage reinstated and foreclosed. In giving relief the court said: "The complainant received no consideration for the act—the defendant gave none. The complainant entered into no engagement from which he asks relief. Under a mistaken impression that the mortgage was satisfied he consented to its cancellation. It is clearly against conscience that the defendant should avail him-

4. See Cal. Civil Code § 3408. "On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require."

5. (1892) 94 Cal. 56, 29 Pac. 329.

1. (1802) 15 N. J. Eq. 103, 2 Ames Eq. Cas. 308.

self of the mistake to escape the payment of an honest debt."[2]

§ 373. Mistake of law—historical development.

The historical development of this topic in the subject of reformation has already been traced;[1] its development in the subject of rescission is similar. In early times, apparently no distinction was drawn between mistakes of law and mistakes of fact.[2] Later, due at least partly to Lord Ellenborough's unfortunate language in Bilbie v. Lumley,[3] the rule came to be stated[4] that equity would not grant rescission where the mistake was one of law.[5]

§ 374. Same—present state of the law.

On the whole, the rule has not been popular with the courts;[1] some have apparently thrown the rule

2. See also Gerdine v. Menage (1889) 41 Minn. 417, 43 N. W. 91, 2 Ames Eq. Cas. 286, where the mortgagee cancelled the mortgage thinking he had acquired title under foreclosure proceedings; and Swedesboro Loan etc. Ass'n v. Gans (1903) 65 N. J. Eq. 132, 55 Atl. 82.

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1. See *ante* § 345.

2. Merrick v. Harvey (1649) Nelson 48; general release was set aside because it was not intended to release a certain bond. See also Turner v. Turner (1680) 2 Reports in Chancery 154, 2 Ames Eq. Cas. 263, where the plaintiff did not know that he had title as executor; and Bingham v. Bingham (1748) 1 Ves. Sr. 126, 2 Ames Eq. Cas. 264, mistake of law as to title. But see 8 Col. Law Rev. 485, 486, arguing that the early equity gave no relief for mistake of law.

3. (1802) 2 East 469; see *ante* § 345.

4. In Swedesboro Loan etc., Ass'n v. Gans (1903) 65 N. J. Eq. 132, 55 Atl. 82, the court attributes much influence in this country to Chancellor Kent's remarks in the early case of Lyon v. Richmond (1816) 2 Johns Ch. 51, 60.

5. Dupre v. Thompson (1848) 4 Barb. 279, citing 1 Story's Eq. Juris. §§ 137, 138.

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1. Apart from the lack of either logical or practical justification in denying rescission because the mistake was one of law

overboard entirely,[2] while others have been so astute in drawing distinction as to leave very little of the rule. Thus, in practically all jurisdictions to-day, the rule does not apply where the mistake was as to the ownership of property, either upon the ground that such a mistake is one of fact[3] or upon the ground that the rule applies only to mistake of a general rule of law and not to mistake of a private right. In Cooper v. Phibbs[4] the court's argument was as follows: "It is said, *Ignorantia juris haud excusat;* but in that maxim the word *'jus'* is used in denoting general law, the ordinary law of the country. But when the word *'jus'* is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact: it may be the result also of matter of law;[5] but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights,[6] the result is that that agreement is liable to be set aside as having proceeded under a common mistake."

there is sometimes a considerable difficulty in determining whether a mistake is of law or fact. This is not surprising because law is merely a particular kind of fact.

2. See Lansdowne v. Lansdowne (1730) Mosely 364; Broughton v. Hutt (1858) 3 DeG. & J. 501.

3. Swedesboro Loan etc., Ass'n v. Gans (1903) 65 N. J. Eq. 132, 55 Atl. 82: "The mistake was in respect to the ownership of the property upon which the cancelled mortgage was an incumbrance, and the English cases treat such a mistake as one of fact."

4. (1867) 3 H. of L. 149, 2 Ames Eq. Cas. 266. See also 17 Harv. Law Rev. 138 and Pusey v. Desbourrie (1734) 3 P. Wms. 315; Goff v. Gott (1858) 5 Sneed 562, 2 Ames Eq. Cas. 281 (mistake of title of horse due to ignorance of the law of *bona fide* purchase for value).

5. What the court probably meant was that mistake of private ownership may or may not be due to mistake of law; if it is due to a mistake as to where the survey fixed the boundary line, it is due to a mistake of fact; but if it is due to a mistake of the legal meaning of the word "children" in a deed or will, then it is due to a mistake of law.

6. If the suggested exception were applied liberally it would go far toward negativing the rule because most mistakes of law may be

In a few jurisdictions a distinction has been attempted between ignorance of law and mistake of law, denying relief for the former but not for the latter.[7] While perhaps there may be something said for this[8] on the score of offering a premium to those who attempt to find out the law, it is much too fine a distinction for everyday use, and gives no sufficient reason for denying relief for ignorance of law.[9]

The tendency to evade the rule is also shown in such cases as Jordan v. Stevens[10] where an exception was made because the parties were not on equal terms; and in Griffith v. Sebastian Co.[11] where the court held that since the mistake as to the location of the county seat was a mistake of fact, it was not material that it was induced by a mistake of the law which fixed the county seat. If a court still holds to the rule and

construed as mistakes as to the legal rights of one or both of the parties.

7. Culbreath v. Culbreath (1849) 7 Ga. 64: "There is a clear and practical distinction between ignorance and mistake of the law. Much of the confusion in the books, and in the minds of professional men, upon this subject, has grown out of a confounding of the two. It may be conceded, that at first view, the distinction is not apparent; but it is insisted that upon close inspection it becomes quite obvious. . . . Ignorance implies passiveness; mistake implies action. Ignorance does not pretend to knowledge, but mistake assumes to know. Ignorance may be the result of laches, which is criminal; mistake argues diligence which is commendable."

8. Might it not be plausibly urged that one who has actively tried to find out and who has assumed to know is deserving of less consideration than one to whom no doubt has arisen, upon the ground that he chose to act upon such investigation knowing that a legal question was involved and thus undertook the risk of error? The application of such a distinction to the facts would often be no easy matter.

9. Since the rule denying rescission for mistake of law is so objectionable, perhaps any limitation of the rule, even if illogical, should be welcomed in the interests of justice, but the making of illogical exceptions is not the ideal way to correct anomalies in the law.

10. (1863) 51 Me. 78.

11. (1886) 49 Ark. 24, 3 S. W. 886.

is unable to find any ground for an exception, which it considers satisfactory, rescission will be refused.[12] If a court cannot see its way to abrogate the rule entirely, relief must be had by legislation.[13]

§ 375. Same—change of judicial decision.

In Kenyon v. Welty[1] the defendant bought a piece of land in Sacramento at a sheriff's sale; shortly afterward the California Supreme Court held that the court issuing the execution process did not have jurisdiction outside San Francisco. Thereupon the plaintiff and defendant made an agreement with reference to the land upon the assumption that the levy and sale were invalid. Still later, in another case, the Supreme Court reversed itself and held that the court did have jurisdiction. The plaintiff then asked for rescission on the ground of mutual mistake but relief was refused apparently upon the ground that it was a pure mistake of law. The decision is to be commended because the social interest in the security of the transaction such as that in this case should not be upset merely because the Supreme Court decides a later case differently.[2] But was there really any mistake at all? This depends upon whether the first decision really was the law of California till overruled[3] or whether it was a mistake on the part of the Supreme Court, and that the later decision was the law all the

12. Eldridge v. Dexter etc. R. R. Co. (1895) 88 Me. 191, 33 Atl. 974 (mistake of legal effect of deed); Williams v. Thwing Electric Co. (1896) 160 Ill. 526, 43 N. E. 595 (mistake as to Illinois law of incorporation); Proctor v. Thrall (1850) 23 Vt. 262, 2 Ames Eq. Cas. 270 (mistake as to the legal effect of a bond).

13. In a few states this has been done; see 8 Col. Law Rev. 484-486.

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1. (1862) 20 Cal. 637, 2 Ames Eq. Cas. 283.

2. If rescission were given to the plaintiff in Kenyon v. Welty what would happen if the Supreme Court should reverse its second opinion and restore the first?

3. See 21 Harv. Law Rev. 120-129, arguing for this view.

time but merely failed to be earlier discovered and declared by the Supreme Court. If we adopt the second view, then there was a mistake of law and it may be plausibly argued that this is a case where the rule denying rescission because a mistake is one of law operated beneficially;[4] but if we adopt the first view—which more nearly corresponds to what actually takes place—then there was no mistake of any kind and hence no basis for rescission.

§ 376. Lapse of time.

No general rule can be laid down as to the effect of the plaintiff's delay in bringing suit for rescission, much depending upon other circumstances of the case. In Simmons v. Palmer[1] the bill was to rescind a conveyance on the ground that the wrong lot had been conveyed through mistake. The plaintiff had discovered the mistake very soon after the conveyance and promptly pointed out the error to the defendants; but altho he demanded back his money and bonds, he did not tender back the deed and did not sue for rescission until about two years later. In denying relief the court said: "In the meantime he had held the deed and was in a position to profit by the transaction had the lots continued to enhance in value; and he now seeks to be released from the purchase when the situation has so changed that the other parties can not be restored to their former position. The application for relief in such cases must be made with due diligence, and what constituted due diligence is to be determined by reference to the facts attending the particular case in judg-

4. Even if we should adopt this view as to the effect of judicial decisions upon law and should at the same time abrogate the rule denying rescission for mistake of law, the case of Kenyon v. Welty would make a logical exception to such a rule, because of the social interest in the security of transactions.

1. (1896) 93 Va. 389; 25 S. E. 6.

ment." On the other hand in Hall v. Otterson[2] the court rescinded a deed of trust after twenty-eight years where it appeared that there was a relation of confidence between the parties and that the plaintiff's vigilance had been put to sleep by assurances.[3]

§ 377. Negligence in failing to discover the mistake.

Where either before or at the time of a bilateral transaction the party asking rescission could have discovered the mistake by the exercise of ordinary care[1] and the other party has since so changed his position as to make it inequitable to give rescission, relief is properly refused upon the ground of estoppel.[2] On the other hand, if the transaction was a unilateral one, the plaintiff's negligence is rightly held to be no bar to relief.[3] In some bilateral transactions in which there

2. (1894) 52 N. J. Eq. 522; 28 Atl. 907.

3. In Barkley v. Hibernia Savings and Loan Society (1913) 21 Cal. App. 456, 132 Pac. 467 it was decided not to be error for the trial court to dismiss the suit for an unexplained delay of three years. In Lumley v. Wabash Ry. Co. (1895) 71 Fed. 21 where a delay of five years was held fatal the court said that poverty was no excuse for such delay.

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1. Or where after discovering the error he fails to notify the other party; Haviland v. Willets (1894) 141 N. Y. 35, 35 N. E. 958, 2 Ames Eq. Cas. 273.

2. Grymes v. Sanders (1876) 93 U. S. 55.

3. Banta v. Vreeland (1862) 15 N. J. Eq. 103, 2 Ames Eq. Cas. 308: "It is urged on the part of the defendant that to entitle a party to relief on the ground of mistake, it must be of such a fact as he could not by reasonable diligence have obtained knowledge of. If otherwise, it is culpable negligence, against which equity will not relieve. The principle is usually applied in relieving against contracts entered into under a mistake, tho it is doubtless susceptible of a wider application. The present case, however, does not fall within the operation of the principle. The complainant received no consideration for the act—the defendant gave none. The complainant entered into no engagement from which he asks relief. Under a mistaken impression that the mortgage was satisfied, he consented to its cancellation. It is clearly against con-

was apparently no change of position or any other circumstances making rescission inequitable, relief has been refused[4] upon the ground that the giving of relief would encourage carelessness.[5] Such reasoning is of doubtful validity.[6] If the facts were obvious and open to observation[7] a court may well require very strong proof that the plaintiff really did not see, but to lay down a hard and fast rule that negligence alone is a bar to rescission seems to inflict unnecessarily a penalty on the plaintiff.[8]

science that the defendant should avail himself of the mistake to escape the payment of an honest debt." But see Conner v. Welch (1881) 51 Wisc. 431 where the plaintiff was denied reinstatement of mortgages which he had mistakenly satisfied of record; perhaps there had been a change of position in reliance upon the cancellation, but it does not appear.

4. See Dillet v. Kemble (1874) 25 N. J. Eq. 66. Perhaps the most common case is that of failure to read an instrument which the plaintiff has executed. Placer Co. Bk. v. Freeman (1899) 126 Cal. 90, 58 Pac. 388, instrument was a draft instead of a receipt; Eldridge v. Dexter etc. R. R. Co. (1895) 88 Me. 195, 33 Atl. 974: "No great reliance is placed on the allegation that the deed was executed without being read. The deed was left with one of the complainants to procure the signature of the other. If it was not read by them, it was their own fault. They were not misled in any way as to its contents."

5. Conner v. Welch (1881) 51 Wisc. 431: "It is infinitely better that men should be held to the consequences of their own culpable carelessness than that courts of equity should undertake to relieve therefrom. . . . The abrogation of the rule would tend to encourage and to introduce uncertainty and confusion in all business transactions."

6. That one has been negligent in making a mistake is no bar in an action in quasi contract. Woodward, Quasi Contracts § 15.

7. For example, where the plaintiff purchaser says he did not notice that an abandoned shaft was not within the boundaries; Grymes v. Sanders (1876) 93 U. S. 55.

8. Such seems to be the position taken by the court in Seeley v. Bacon (1896) 34 Atl. 139 (N. J. Eq.): "Where, however, no one is injured by the mistake but the party himself, and no one has changed his position by reason of the act executed through the influence of the alleged mistake, I see no reason why the mistake should not be corrected, although the highest degree of vigilance has not been exercised."

§ 378. Ratification —compromise.

If the plaintiff after learning of the mistake has expressly or by his conduct[1] ratified the transaction, it is then too late to ask for rescission.[2] Similarly, one who has entered fairly into a compromise of a disputed question of law or fact is barred from equitable relief by such inconsistent conduct. In Hall v. Wheeler[3] there was a disputed question as to whether the time for redemption from a tax sale had expired; the plaintiff and the defendant entered into a transaction compromising the matter; later it was judicially decided that the time had not expired and the plaintiff then asked for rescission. In denying relief: "As there was no fraud, no misrepresentation, nor mistake of fact, and as the parties had equal means of ascertaining what their respective rights were, the courts must uphold any compromise of such right, altho a judicial decision should afterwards be made showing that these rights were different from what they supposed them to be, or showing that one of them really had no rights at all, and so nothing to forego."

§ 379. Placing the defendant in statu quo.

Acting upon the equitable principle that a party who seeks equitable relief should be required as a condition thereto to do equity to the other party,[1] one who asks rescission is usually required to place the other party in *statu quo*.[2] Tho occasionally there is a

1. In Simmons v. Palmer (1896) 93 Va. 389, 25 S. E. 6, implied ratification was an element in denying relief.

2. One method of ratification is to pursue to judgment an action which is an affirmance of the transaction after knowledge of the mistake. For an analogous case where rescission for fraud was sought, see Sanger v. Wood (1818) 3 Johns. Ch. 416. See *post* § 393.

3. (1887) 37 Minn. 522, 35 N. W. 377, 2 Ames Eq. Cas. 288.

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1. See *ante* § 29.

2. Grymes v. Sanders (1876) 93 U. S. 55. In Okill v. Whittaker (1847) 2 Phillips 338, 2 Ames Eq. Cas. 201, the court said briefly:

tendency to apply the principle mechanically by denying relief if such restoration is for any reason impossible, the better view is that the principle never requires more than substantial restoration[3] and that the impossibility of giving even substantial restoration may be excused by countervailing circumstances.[4]

C. FRAUD.

§ 380. Does fraud alone give equity jurisdiction?

One case where rescission is given for fraud has already been discussed, namely, where one party knowingly takes advantage of the mistake of the other.[1] The most common kind of fraud, however, is that which consists in knowingly causing the error of another party—usually the other party to the transaction;[2]

"The plaintiffs do not ask to rescind the transaction altogether: nor could they; for after ten years occupation and expectation of the benefit of renewal, it would be impossible to restore the purchaser to his original situation." See also Anderson v. McDaniel (1893) 15 Ky. Law Rep. 151, 22 S. W. 647; 8 Col. Law Rev. 123-125.

3. Mather v. Barnes (1906) 146 Fed. 1000, 1019; 6 Cyc. 306.

4. Grymes v. Sanders (1877) 93 U. S. 55: "A court of equity is always reluctant to rescind, unless the parties can be put back in *statu quo*. If this cannot be done it will give relief only where the clearest and strongest equity demands it."

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1. See *ante* § 369.

2. When the term fraud is used alone, this is the class of cases usually indicated. This is true in the following analysis of the difference between accident, mistake and fraud, in 23 Harv. Law Rev. 608: "As a ground for affirmative relief, mistake is often placed in the same category with accident and fraud. All these have the common characteristic that each, when established in the legal sense, creates an inequality between the parties which will move the discretion of the Chancellor to action. Moreover, there is no bright line which divides mistake from either fraud or accident. Yet mistake is distinguishable from both. Accident creates a change in the actual situation of the parties—as destruction of the subject matter of a bargain by the act of God. It contains no mental element. Mistake, on the other hand, leaves the actual facts untouched. It involves affirmative action by the human mind. It consists in forming an incorrect mental picture of the situation. If this incorrect picture is

and there is also the large class of cases of fraud upon creditors which rarely contain any element of misrepresentation.

Courts have wisely refrained, however, from attempting to define fraud because even tho they should succeed in framing a definition which would cover all the adjudicated cases on the subject, it might later be a handicap to giving relief in a new case not falling within the definition.[3]

Fraud is one of the earliest subjects of equity jurisdiction and until the action on the case[4] for deceit was devised the sole relief seems to have been in equity. Upon the principle that having once acquired jurisdiction of a certain field equity will not usually abandon the jurisdiction even tho the common law later gives a complete and adequate remedy,[5] English

caused by the unlawful representations or unlawful silence of another human being, the case passes from the realm of mistake into the realm of fraud. The presence of the mental ingredient, then, is the striking difference between accident and mistake. Fraud, on the other hand, consists of mistake plus a further element, the unlawful causing of the error by some person different from the person who labors under the mistake. Broadly speaking, then, if the error is the work of the party who labors thereunder the case is one of mistake. But, if the incorrect mental picture be due to the unlawful silence or the unlaful representations of some third (*sic*) party this further element of third (*sic*) party causation makes the case one of fraud. For this reason equity is slower to relieve from mistake than from fraud. The fact that the party who sets up the mistake is the party responsible therefor makes it necessary for him to show special and peculiar grounds for relief."

3. Lawley v. Hooper (1745) 3 Atk. 278: "The court very wisely hath never laid down any general rule beyond which it will not go, lest other means of avoiding the equity be found out."

4. The action on the case grew out of the Statute of Westminster II, 1285, which required the clerks in Chancery to issue new common law writs based upon analogy to those already in use. Since the writ in trespass was apparently the most adaptable of the old writs, it was used as a basis for the new writs, so that the new actions came to be called "trespass on the special case," "trespass on the case," "action on the case," or "case." At the present time probably ninety percent of common law rights are redressed by some action on the case, or its code equivalent.

5. See *ante* § 16.

courts apparently regard all cases of fraud as entitling the party defrauded to equitable relief.[6] In this country, on the other hand, the prevailing view seems to be that where the party defrauded may get an adequate remedy at law the court of equity has no jurisdiction.[7] In a minority of jurisdictions equity will grant such peculiar relief as it can alone give even tho the remedy at law is adequate.[8]

§ 381. Action at law for fraudulent representation.

If only money compensation is sought for damage caused by fraudulent representations made to the plaintiff, the remedy at law is an action on the case for deceit. In order to succeed in this action the plaintiff must allege and prove the following:

(1) The defendant made a representation to the plaintiff.

(2) The representation was not true in fact.

(3) The defendant did not believe that the representation was true in fact.

(4) The defendant expected the plaintiff to act in reliance upon it.

(5) The plaintiff did so act, and was damaged thereby.

If in similar cases relief is sought in equity, the requirements for obtaining relief are in some respects less stringent. In the following sections the respective attitudes of law and equity toward these various essentials will be compared.

§ 382. (1) Representation made to the plaintiff—promise—opinion—intention.

Altho a representation is usually made in words—

6. Colt v. Wollaston (1723) 2 P. Wms. 154 (mere money judgment asked).

7. Skinner v. Bailey (1829) 7 Conn. 496.

8. See 6 Mich. Law Rev. 330-333 and cases cited.

either oral or written—it may also be made by conduct.[1] It may be made to the plaintiff directly or it may be made to a third party with intent that it be communicated to the plaintiff;[2] if there is no such intent the plaintiff can get neither common law nor equitable relief.[3] It may be made by the defendant himself or by his agent or the defendant may procure it to be made by a third party.[4]

A representation can only be as to a fact:[5] in the nature of things there can be no representation as to anything in the future. Hence an action for deceit will not lie for a mere breach of promise to do something in the future;[6] rescission may be given in such a case,[7] but not on the ground of fraud.

1. De Brampton v. Seymour (1386) Selden Soc'y Select Cases in Ch. No. 2: "J. S. maliciously and falsely scheming to deceive the said J. B., showed him twenty marks in gold in his hand and demanded from him the said release, which J. B. gave him, hoping to have received the twenty marks etc." See also Croyle v. Moses (1879) 90 Pa. 250; a horse known by seller to be a "crib biter" was short hitched so as to hide the fault.

2. Davis v. Louisville Trust Co. (1910) 181 Fed. 20; representations as to credit made to a commercial agency; plaintiff was allowed rescission tho he was not a subscriber to the agency; see 24 Harv. Law Rev. 327.

3. Hunnewell v. Duxbury (1891) 154 Mass. 286, 28 N. E. 267; false representation in a certificate filed with the commissioner of corporations, stating that the amount of the capital stock had been paid in; the plaintiff, relying upon the statement, bought notes of the corporation. "The certificate was made and filed for the definite purpose, not of influencing the public but of obtaining from the state a specific right [to do business within the state] which did not affect the validity of its contracts, but merely relieved its agents in Massachusetts of a penalty. It was not addressed to or intended for the public, and was known to the plaintiff only from the search of his attorney."

4. Whittingham v. Thomburgh (1690) 2 Vernon 2[illegible]; defendant procured one H to represent that one E. H. was healthy and thereby induce others to underwrite E. H.'s life.

5. I. e., something done or accomplished. A future fact is a contradiction in terms.

6. Long v. Woodman (1870) 58 Me. 49 (promise to give a bond to reconvey).

7. See *post* § 403.

The mere giving of an opinion[8] which does not accord with the facts is not in itself deceit,[9] because there is no representation as to the facts themselves but the giving of an opinion necessarily includes a representation that one does have such an opinion; if he lies as to his opinion he is subject to an action of deceit or to having the transaction rescinded in equity just as if he had lied as to any other fact.[10]

Lying as to one's intention should be treated in the same way,[11] but there has been some reluctance to recognize this as a basis for an action of deceit;[12] equity courts, however usually regard this as fraud and give rescission therefor.[13]

8. The difference between fact and opinion is shortly this: fact is generally a matter of sensation in which persons usually agree; opinion is a matter of judgment in which persons are likely to differ.

9. Sawyer v. Pickett (1875) 86 U. S. 146.

10. In Pasley v. Freeman (1789) 3 Term Rep. 51 the defendant represented that one F was a person safely to be trusted; in Smith v. Land Corporation (1884) L. R. 28 Ch. D. 7, 16, that the property was let to a most desirable tenant.

11. In Edgington v. Fitzmawrice (1882) 29 Ch. Div. 459 where the defendants lied as to what they intended to do with money they borrowed from the plaintiff, the court said: "There must be a misstatement of an existing fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is but if it can be ascertained it is as much a fact as anything else. A misstatement as to the state of a man's mind is, therefore, a misstatement of fact."

12. In Swift v. Rounds (1896) 19 R. I. 527, 35 Atl. 45, the court overruled a demurrer to a declaration in deceit which alleged that the defendant did not at the time intend to pay for goods which he bought of the plaintiff. But see *contra*, Smith v. Smith, Murphy & Co. (1853) 21 Pa. St. 307.

13. Wampler v. Wampler (1878) 30 Grattan 454, representation that defendant intended to support the plaintiff; Adams v. Gillig (1910) 199 N. Y. 314, 99 N. E. 670; representation that he intended to put improvements upon real estate. See 11 Col. Law Rev. 477.

§ 383. (2) Representation not true in fact—suppression—concealment—non-disclosure.

In determining whether the defendant's representation is true or false, it is not conclusive that everything the defendant stated was literally true. In Newall v. Randall[1] the defendant stated to the plaintiff that he had $3300 invested in business; the representation was couched in language calculated to negative the idea that this was merely the gross amount of his assets. As a matter of fact he owed debts to the extent of two-thirds of that amount. It was held that suppression of such a material fact, under these circumstances, was fraud.[2] The test in these cases seems to be this: Is the suppression such that the withholding of that which is not stated make that which is stated false?

Defendant's conduct may also be made fraudulent by the active concealment of a material fact. In Brotherton Bros. v. Reynolds[3] the court in awarding to the plaintiffs rescission of a contract to buy timber relied partly upon the fact that the defendant had instructed his servant to show the plaintiffs over only the best part of the 1000 acres of timber and not to show them that part which had been cut.[4]

Whether mere non-disclosure is fraudulent depends largely upon the relative situation of the parties. If one party to a transaction is under a fiduciary obliga-

1. (1884) 32 Minn. 171, 19 N. W. 972.

2. See also Kidney v. Stoddard (1843) 7 Metc. 252 (defendant in writing a letter of recommendation of his son, asking plaintiff to give him credit, omitted to state that the son was a minor. In Torrance v. Bolton (1872) 8 Ch. App. 118 the advertisement of an auction described property as the "absolute reversion" when in fact it was subject to several mortgages. The plaintiff was awarded rescission of the contract of purchase. And in Brown v. Montgomery (1859) 20 N. Y. 287 the failure of the seller of a check to make known the drawer's insolvency was held to be fraudulent.

3. (1894) 164 Pa. St. 134, 30 Atl. 234.

4. See also Croyle v. Moses (1879) 90 Pa. St. 250, where the vendor of a horse short-hitched him so as to conceal the fact that he was a "crib biter."

tion to the other with respect to the subject-matter of the transaction, he is under a duty to disclose every material fact within his knowledge;[5] but if there is no such relationship so that the parties deal at arms' length, a failure to disclose is ordinarily not fraudulent. Thus, a seller of land is not entitled to have the contract rescinded merely because the purchaser knew the real value of the land and the seller did not:[6] or because the purchaser had made an oral contract to resell the land at a profit.[7] Nor can the seller of chattels rescind merely because the buyer failed to disclose his insolvency.[8]

§ 384. (3) Defendant's disbelief in representation—negligent and innocent misrepresentation.

In order that an action of deceit should lie it is ordinarily necessary that the defendant should not believe the representation to be true; if he had a positive belief therein, he is not so liable.[1] On the other hand, positive knowledge that the representation is false is not essential; it is sufficient if he had no belief in its truth; that is, if he made it recklessly without caring whether it was true or false.[2] Where accurate knowledge as distinguished from mere opinion is possible, the defendant may be liable in deceit for representing his belief as knowledge.[3] But if the subject matter of

5. See *ante* § 157.

6. Harris v. Tyson (1855) 24 Pa. 347; Neill v. Shamburg (1893) 158 Pa. 263, 27 Atl. 992 (oil land); or the value of the seller's interest therein, Pennybacker v. Laidley (1890) 33 W. Va. 624, 11 S. E. 39.

7. Dolman v. Nokes (1855) 22 Beav. 402.

8. Hotchkin v. Third Nat'l Bank of Malone (1891) 127 N. Y. 329, 27 N. E. 1050.

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1. Mahurin v. Harding (1853) 28 N. H. 128.

2. Derry v. Peek (1889) 14 App. Cas. 337, 368.

3. Cabot v. Christie (1869) 42 Vt. 121 (defendant stated that of his own knowledge the farm contained 130 acres; it was held no defense that he honestly believed there were 130 acres).

the representation is such that accurate knowledge is impossible or very difficult to obtain, a representation that he had knowledge is not actionable if the defendant honestly believed the statement to be true. In Haycraft v. Creasy[4] the defendant had made the following representation to the plaintiff's son: "Your father may credit Miss Robertson with perfect safety: for I know of my own knowledge that she has been left a considerable fortune lately, etc." In holding the defendant not liable Grose, J., said: "It is true that he asserted his own knowledge upon the subject: but consider what the subject matter was of which that knowledge was predicated: it was concerning the credit of another, which is a matter of opinion. When he used these words, therefore, it is plain that he only meant to convey his strong belief of her credit, founded upon the means he had of forming such an opinion and belief. . . . And taking the whole together, I think the evdence goes no further than his asserting that, to his firm belief and conviction, she was deserving of credit; and that the defendant was himself a dupe to appearances."

If the defendant honestly believed the statement to be true but was negligent in so believing, an action on the case for deceit will not lie, but an action on the case for negligent misrepresentation should be sustained upon the same principles and with the same limitation as are other actions on the case for negligence.[5]

The rule as to rescission is more liberal to the plaintiff than is the action for deceit. Since equity will rescind for mutual mistake as to an intrinsic fact the plaintiff's case is merely made stronger if it be shown that the defendant innocently caused the plain-

4. (1801) 2 East 92.

5. Liability for Negligent Language, by Professor Jeremiah Smith, 14 Law Rev. 184-199. See also Liability for Honest Misrepresentation, by Professor Samuel Williston, 24 Harv. Law Rev. 415, 427.

tiff's mistake.[6] And even where the defendant's innocent misrepresentation was as to an extrinsic fact, there is a tendency to grant rescission.[7]

§ 385. (4) Defendant's intent that plaintiff act upon representation.

In order to maintain an action at law for deceit it is necessary to show not only that the defendant intended the representation be communicated to the plaintiff[1] but also that he intended the plaintiff to act in reliance upon it. In Wells v. Cook[2] the defendant sold to the plaintiff, as agent for the plaintiff's brother O. W. a herd of sheep falsely representing them to be free from disease; later the plaintiff bought the sheep from his brother. The plaintiff failed in his action because there was nothing to show that the defendant intended any one except the plaintiff's brother to act upon the representation.[3]

But it is not necessary either that the defendant

6. See *ante* § 368.

7. In Smith v. Bricker (1892) 86 Iowa 285, 53 N. W. 250: "It does not appear that defendant had actual knowledge of the quality and value of the land when he made the representations. In other words, there is no evidence of what is called the "*scienter*" which is usually necessary to sustain an action at law for fraud and deceit in the sale or exchange of property. But this is a suit in equity and there may be a decree rescinding a contract for false representations, without proving that the party making the representations knew them to be false. Smith v. Richards (1839) 13 Peters 26. And even if the party innocently misrepresents a fact by mistake, it is equally conclusive for its operates as a surprise and imposition on the other party."

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1. See *ante* § 381.

2. (1865) 16 Ohio St. 67.

3. Whether the plaintiff could rescind the transaction with his brother would depend upon whether there was an implied warranty as to the freedom of sheep from disease and further, whether there may be recission for breach of warranty; see Williston, Sales §§ 603, 608.

be a party to a contract with the plaintiff[4] or that he receive any benefit from the deceit,[5] or even that he be actuated by any motive of gain for himself.[6] And so far as the essentials of fraud are concerned, these are just as unessential in equity as at law. But in this country, where fraud alone is not a sufficient basis for equity jurisdiction,[7] a plaintiff will rarely succeed in equity unless he is asking that the defendant be deprived of some of the fruits of the fraudulent transaction.

§ 386. (5) Plaintiff's reliance upon representation—damage therefrom.

If the plaintiff did not act in reliance upon the defendant's representation the defendant is not liable in deceit because in such case the representation is not the cause of the plaintiff's damage.[1] But the representation need not be the sole or even the predominating cause of the plaintiff's action; it is enough that it be any material part of the cause.[2]

4. See Wells v. Cook, *supra;* Pasley v. Freeman (1789) 3 Term Rep. 51 seems to be the first case so holding.

5. Pasley v. Freeman *supra.*

6. Foster v. Charles (1830) 7 Bing. 105; defendant recommended one J to the plaintiff as an excellent young man and worthy of credit; he was held liable tho it was obvious that he did not expect to profit by the plaintiff's acting on the representation. See also Polhill v. Walter (1832) 3 Barn. & Ad. 114, where the defendant without authority signed one H's name to a bill of exchange thinking he was merely saving trouble and delay in getting the bill accepted.

7. See *ante* § 380.

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1. In Nye v. Merriam (1862) 35 Vt. 438: "If the plaintiff did not recollect the false statement—did not know and could not tell what the balance due for the butter was, according to the original falsehood, nor what the figures were which indicated the false weight, but claimed a balance sufficient to cover the whole and true weight, and received it on settlement, we are at a loss to see how he can claim to have been defrauded."

2. Matthews v. Bliss (1839) 22 Pick. 48.

The rule in equity is similar. In Farnsworth v. Duffner,[3] the plaintiff failed to get rescission of a contract to purchase land because "he did not act on their representations that the title was good, but brought his own counsel from home to examine those records, and acted upon his own judgment of the title." In some cases, however, it is said that the defendant has the burden of proving that the plaintiff was not misled.[4]

While the law of deceit requires that the plaintiff allege and prove special damage to himself,[5] the rule in equity is more liberal to the plaintiff; it is unnecessary for the plaintiff to allege damage,[6] and he may get rescission if any damage whatever is proved.[7] Furthermore, even if the plaintiff suffers no damage whatever, he has been allowed rescission because of the damage to third parties. In Brett v. Cooney[8] the plaintiff had made without consideration an oral agreement with his neighbor not to sell his summer residence to any one who would use it for an improper purpose. To carry out this moral obligation, he refused to sell

3. (1891) 142 U. S. 43.

4. Torrance v. Bolton (1872) 8 Ch. App. 118.

5. In most cases of deceit the special damage consists of a property loss, but in a few cases the plaintiff has been damaged by suffering personal injuries; Langridge v. Levy (1837) 2 M. & W. 519 (plaintiff injured by explosion of gun fraudulently represented by defendant).

6. Wainscott v. B'ld'g & Loan Ass'n (1893) 98 Cal. 253, 33 Pac. 88: "He who would recover damages in a court of law must set forth in an orderly manner the facts showing the right to recover, and the amount to which he is entitled to the exclusion of every presumption to the contrary. In such an action the damages are the essential thing. In an action to rescind, upon the ground of fraud, the fraud is the essential thing, and while it must be coupled with loss, injury, damage, the precise amount of such damage is of secondary importance."

7. Wilson v. Carpenter's Admin'rs (1895) 91 Va. 183, 21 S. E. 243: "The court does not inquire with any care into the extent of the prejudice. It is sufficient if the party misled has been very slightly prejudiced—if the amount is at all appreciable."

8. (1902) 75 Conn. 338, 53 Atl. 729.

to the defendant. The latter then employed an agent who fraudulently represented to the plaintiff that he wished to buy for an unobjectionable third person; he obtained a deed and conveyed to the defendant. Tho the plaintiff suffered no damage the neighbor did and thus the court's giving of rescission may well be justified.[9] And even tho no one was damaged a few cases have given rescission.[10]

§ 387. Non-actionable representations—intention as to price—"puffing"—price paid.

Where parties stand in the relation of vendor and purchaser and deal on an equal footing some representations are regarded as not actionable tho all the essentials of deceit are present. If a vendor should falsely represent that he did not intend to take less than a certain price or a purchaser that he did not intend to give more than a certain price, such representations would not be actionable even tho made with intent to deceive.[1] And representations made by a vendor by way of puffing his wares fall within the non action-

9. See *ante* § 160.

10. Harlow v. La Brun (1897) 82 Hun 292: plaintiff induced by fraud to enter into partnership with the defendant; Williams v. Kerr (1893) 152 Pa. 560, Atl. 618: "The appellants undertook to show that they paid all the land was worth and now say that fraud without damage is no ground for relief in either law or equity, and because, in the estimation of others, Mrs. Williams sustained no pecuniary damage, she is not entitled to relief. It is quite true that fraud without the concurrence of injury affords no ground for relief in equity. But it is such injury as will be redressed to obtain from an owner, by a false representation of a fact which he deems material, property which he would not otherwise have parted with upon the terms which he is thus induced to accept." But see *contra*, Lynch v. U. S. (1903) 13 Okla. 142, 73 Pac. 1095, where the court refused to grant rescission of a patent obtained from the U. S. by fraud, but for which the full price was paid; see 17 Harv. Law Rev. 204; 60 U. of Pa. Law Rev. 205.

1. Vernon v. Keyes (1810) 12 East 632; Ripy v. Cronan (1909) 131 Ky. 638, 115 S. W. 791.

able class for the same reason, namely, that it is "understood, the world over, that such statements are to be distrusted."[2]

The exception of "puffing" does not, by the weight of authority, and the better view, cover false statements as to price paid at a previous sale,[3] or as to rental.[4] Nor does it apply where the parties have not dealt on an equal footing, as for example where the facts are peculiarly within the defendant's knowledge[5] or where the defendant has thrown the plaintiff off his guard.[6] And apparently the plaintiff can deprive the defendant of the privilege of puffing by expressly telling him that he will rely on the former's judgment and not on his own.[7]

The rule in equity seems to be substantially the same as at law.

§ 388. Representations of law.

It is usually stated to be the rule that an action for deceit will not be sustained for a false representation of law, because "every one is presumed to know the

2. Deming v. Darling (1889) 148 Mass. 504, 20 N. E. 107, representation that the bond was of the very best and safest, an A 1 bond, and that the mortgage was good security for it; Gordon v. Parmelee (1861) 2 Allen 212, representation that the land was productive and adapted to stock raising.

3. Fairchild v. McMahon (1893) 139 N. Y. 290, 34 N. E. 779. In a few jurisdictions this is regarded as "puffing," bringing about the peculiar result that a vendor is not liable in such a case but a third party who makes such a representation is not so protected; Medbury v. Watson (1843) 6 Metc. 246.

4. Ekins v. Tresham (1664) 1 Levinz 102 (representing that premises were let at £ 42 per annum when they were really let at only £32).

5. Coon v. Atwell (1866) 46 N. H. 510 (representations as to the amount of hay produced by a farm).

6. Stover's Adm'rs v. Wood (1875) 26 N. J. 417 (defendant told the plaintiff to satisfy himself elsewhere). In Smith v. Richards (1839) 13 Peters 26 the defendant's letter, "I, however, sell it to you for what it is, gold or snow balls etc.," probably had the effect of throwing the plaintiff off his guard.

7. Keen v. James (1885) 39 N. J. Eq. 527.

law" and therefore the plaintiff could not have relied upon the representation.[1] The fallacy underlying this argument has already been pointed out in discussing reformation[2] and rescission for mistake of law.[3] That the rule is unpopular is shown by the willingness of courts to make exceptions to the rule.[4]

All that was said in criticism of refusing relief in equity for mistake of law applies,[5] of course, with even greater force to cases where the defendant has made a fraudulent representation of the law. But altho the rule is unpopular[6] in equity courts, it has apparently not been thrown overboard.[7]

1. Gormeley v. Gymnastic Ass'n (1882) 55 Wis. 350, 13 N. W. 242: "The appellant was just as much bound to know that the license of the respondent would not protect him in the sale of liquors, etc., as the respondent was."

2. See *ante* §§ 345, 346.

3. See *ante* § 373.

4. If the parties are on an unequal footing or if the plaintiff is thrown off his guard, relief is usually given; Decker v. Hardin (1819) 5 N. J. L. 579. And questions of ownership are usually treated as questions of fact; Alton v. Nat'l Bk. (1892) 157 Mass. 341, 343, 32 N. E. 228.

5. See *ante* § 373.

6. For example, note the distinction taken in Moreland v. Atchison (1857) 19 Tex. 303; the defendant sold Texas land to the plaintiff, representing that he was an old settler in Texas, that he was familiar with the land laws and that he had a good title to the land. The court held that while ordinarily rescission would not be granted for representation of law, the plaintiff was entitled to relief because the parties were not on an equality, and the defendant took advantage of his superior knowledge; and also because the plaintiff not being a Texan, the law of Texas was foreign law and should be considered as fact. This is certainly an odd application of the rule of evidence that judicial notice will not be taken of foreign law but that the latter must be proved just as other facts are proved. The decision is, of course, to be commended.

7. Grone v. Economic Life Ins. Co. (1911) 80 Atl. 809 (Del. Ch.); 25 Harv. Law Rev. 94.

§ 389. Representations to third parties.

In Benton v. Pratt[1] S and W of Allentown had verbally agreed to buy of the plaintiff some hogs provided they were delivered within a specified time, and S and W were not previously supplied. While the plaintiff was driving his hogs to Allentown, the defendant overtook him with a drove of hogs going to Easton; he learned that the plaintiff was going to Allentown, represented to S and W that plaintiff was driving his hogs to Easton and induced S and W to buy from the defendant; the plaintiff was compelled to drive further and sell at a loss. The plaintiff was properly allowed to recover in an action on the case, but it was not an action of deceit because no false representation was made to the plaintiff, but only to S. and W.

In this case the defendant acquired nothing from the plaintiff by his false representations to S. and W. and in this country,[2] at least, the plaintiff could have obtained no relief in equity.[3] But if by fraudulent representations to a third party the defendant procures something which the plaintiff is equitably entitled to have surrendered up and cancelled, such relief will be given. For example, if the defendant has fraudulently induced the testator to make a will in his favor and the remedy of the probate court is inadequate, the defendant will be held as constructive trustee of what he has received by his fraud.[4] There is conflict of authority upon the question whether a plaintiff is entitled to an injunction against a judgment obtained by perjury, but the better view is that relief should be

1. (1829) 2 Wend. 385.

2. See *ante* § 380.

3. Apparently S. & W. could have rescinded their purchase from the defendant on the ground of the damage to the plaintiff: see *ante* § 386. But it is difficult to see how the plaintiff could compel S. & W., who are innocent, to rescind so that they might buy of the plaintiff.

4. Smith v. Boyd (1901) 127 Mich. 417, 86 N. W. 953; 14 Col. Law Rev. 544.

given with proper safeguards as to first exhausting his legal remedies and furnishing clear proof of the perjury.[5] In a fairly recent case a plaintiff was awarded cancellation of a birth certificate which had fraudulently been procured by the defendant from the attending physician for her illegitimate son.[6]

§ 390. Representations by third parties.

A defendant is made responsible by the law of agency for fraudulent representations made by his servant or agent within the apparent scope of his authority.[1] And even if the fraudulent representation be made by a stranger, the defendant is under an obligation to return to the plaintiff any benefit which he may have received unless he is a *bona fide* purchaser thereof for value; if he is a *bona fide* purchaser he is, of course, entitled to protection.[2] Whether a corporation is entitled to such protection as against subscribers to stock who have been induced to subscribe by a promoter's fraud has been questioned; but the better view and the weight of authority[3] is that rescission should be denied except in the quite unusual case of the corporation's having knowledge of the fraud at the time of acceptance.[4]

5. Boring v. Ott (1908) 138 Wis. 260, 119 N. W. 865; 22 Harv. Law Rev. 600-602. The objections to giving relief in such cases are (1) that it would result in a flood of litigation; (2) each defeated party may charge the other with perjury in the last suit, so that litigation would never terminate.

6. The defendant was the plaintiff's wife but had been living in adultery; Vanderbilt v. Mitchell (1904) 72 N. J. Eq. 910, 67 Atl. 97; see also 21 Harv. Law Rev. 54, 58, 7 Col. Law Rev. 533, 6 Mich. Law Rev. 6.

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1. If authority is expressly given to one not an agent or servant the liability is the same; see *ante* § 382, note 4.

2. See *ante* § 301.

3. Oldham v. Mt. Sterling etc. Co. (1898) 103 Ky. 529, 45 S. W. 779; *contra*, McDermott v. Harrison (1890) 9 N. Y. Supp. 184.

4. For an argument for rescission see 36 Amer. Law Rev. 855;

§ 391. Negligence in failing to discover the fraud.

It is sometimes broadly stated that the failure of plaintiff to use ordinary care to discover the falsity of the defendant's representation is a bar to legal relief.[1] Thus stated the rule is open to two just criticisms: (1) that since deceit is an intentional tort, it is illogical to allow what is practically contributory negligence to be a defense[2] and (2) that it ought to be the policy of the law to protect the weak and credulous —to protect the fool against the knave.

There is a class of cases, however, where it is arguable that the plaintiff should be barred, not exactly because of contributory negligence, but on the ground that he can not be believed when he says that he relied—namely, where the facts were open to his immediate observation, where the parties were on an equal footing and the plaintiff was not thrown off his guard.[3] But even this suggestion is open to the criticism that if the defendant actually intended to deceive, he should not be able to say to the plaintiff that the latter was a fool to believe him, even if the facts were obvious.[4]

and for a criticism thereof see 16 Harv. Law Rev. 380; see also 24 Harv. Law Rev. 747.

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1. Sherwood v. Salmon (1805) 2 Day (Conn.) 128: "The maxim *caveat emptor* applies forcibly in this case. The law redresses those only who use due diligence to protect themselves; such diligence as prudent men ordinarly use." See 17 Harv. Law Rev. 421.

2. Steinmetz v. Kelly (1880) 72 Ind. 442: 8 Harv. Law Rev. 365.

3. Anon. Y. B. 11 Edw. VI. pl. 6: "If a man sells a horse and guarantees he has two eyes and he has not, there will be no action of deceit, because I could have discovered this myself at the beginning of the transaction." Slaughter's Adm'r v. Gerson (1871) 13 Wall. 379, 383: "A court of equity will not undertake, any more than a court of law, to relieve a party from the consequences of his own inattention and carelessness. Where the means of knowledge are at hand, and equally available to both parties and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations."

4. Pomeroy v. Benton (1874) 57 Mo. 531, 542; 8 Harv. Law Rev. 365.

A failure to observe the distinction between immediate observation and later investigation is no doubt responsible for much of the confusion on the subject.[5] If a somewhat extended investigation is necessary to detect the falsity, the tendency both at law[6] and in equity[7] is to give relief. And whether the rule be stated broadly or narrowly,[8] relief will be given to a plaintiff where he has been thrown off his guard[9] or where the parties were on an unequal footing.[10]

§ 392. Lapse of time.

What has already been said as to the effect of lapse of time in cases of reformation of instruments[1] and rescission for mistake[2] substantially applies to rescision for fraud. Unless the statute of limitations is ap-

5. It is not always easy to determine whether observation or investigation is required tho the general distinction is clear. For example, the difficulty the courts have had with the failure of a plaintiff to read a document; cf. Wallace v. Chicago etc. Ry. Co. (1883) 67 Iowa 557, 25 N. W. 772 and Ward v. Spelts (1894) 39 Neb. 509, 58 N. W. 426.

6. Savage v. Stevens (1879) 126 Mass. 207: "The farm respecting which the representations were made was situated . . . far distant from the place of the bargain, no certain knowledge could be obtained by the plaintiff respecting it, except by visiting the estate. Negligence cannot be imputed to the plaintiff as a matter of law in failing to visit a place so distant."

7. Brotherton Bros. v. Reynolds (1894) 164 Pa. 134 (1000 acres of timber on hilly ground).

8. See 16 Harv. Law Rev. 303 for a suggestion that it should be a question of fact under all the circumstances as to whether the defrauded party was inexcusably negligent.

9. Starkweather v. Benjamin (1875) 32 Mich. 305 (plaintiff was induced not to measure land by defendant's positive assurances that it was not worth while).

10. Cottrill v. Krum (1890) 100 Mo. 397, 13 S. W. 753; plaintiff was a stranger to the enterprise whose stock was the subject of sale while the defendant was the originator and promoter of the enterprise and as its business manager was fully conversant with its history and present conditions.

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1. See *ante* § 355.
2. See *ante* § 376.

plied by way of analogy, it is a separate question in each case as to whether under all the circumstances the plaintiff's delay in discovering the error after the transaction occurred[3] or his delay in suing after discovery[4] is such as to make the giving of rescission inequitable to the defendant. If the defendant has changed his position, for example, by making improvements,[5] this will help to show the lapse of time to be inequitable; on the other hand, if the defendant has taken active measures to prevent the fraud from being discovered, it is at least a circumstance in favor of the plaintiff.[6] Furthermore, if the fraudulent representations have been made by the defendant's agents without his authority or sanction—he being made responsible therefor by the rules of the law of agency—the plaintiff's position is much weaker than if the defendant himself were personally tainted with the fraud.[7]

3. In Bostwick v. Ins. Co. (1902) 116 Wis. 392, 92 N. W. 246, the plaintiff signed an application for a life insurance policy, being fraudulently induced by the defendant's agent to believe that it called for a policy different from that for which it really did call. He received the policy called for and paid the first premium. Upon examining the policy four months later he discovered the fraud. For this delay rescission was refused; see 16 Harv. Law Rev. 303.

4. In Parsons v. McKinley (1894) 56 Minn. 464 a delay of six months after discovery of the fraud was held a bar to rescission of a stock subscription; see 12 Col. Law Rev. 463.

5. Foley v. Holtry (1894) 41 Neb. 563, 59 N. W. 781; delay of eight months and valuable improvements was held a bar.

6. See *ante* § 383.

7. Tho there seems to be no express judicial recognition of this distinction, it has apparently had considerable influence on the decisions. It will go far toward explaining some apparent contradictions. Judge Northington no doubt had in mind personal fraud in Alden v. Gregory (1764) 2 Eden 280, 285; "The next question is, in effect, whether delay will purge a fraud? Never—while I sit here. Every delay adds to its injustice and multiplies its oppression." On the other hand, the cases where a short delay has been held a bar have usually been cases where the representations have been made by agents of an innocent principal. For example, see Bostwick v. Ins. Co., *supra* and Tait's Case (1867) L. R. 3 Eq. 795 where relief was refused after only four weeks delay.

§ 393. Ratification—election of remedies.

If after full knowledge[1] of the fraud the plaintiff ratifies the transaction, it is then too late to ask for rescission. Ratification is rarely express;[2] it is usually implied from conduct of the plaintiff inconsistent with his asking for rescission;[3] and long acquiescence has been held a sufficient basis for an inference of ratification.[4]

If the plaintiff pursues to judgment an action at law for breach of contract after knowledge of the fraud, this is an affirmance of the contract and a ratification of the transaction and it is then too late to ask for rescission.[5]

§ 394. Putting defendant in statu quo.

What has already been said on this topic in the subject of rescission for mistake[1] applies to cases where the plaintiff is asking rescission for fraud. There is the same occasional tendency to apply the principle

1. There can be no ratification without full knowledge; Rochester Distilling Co. v. Devendo (1893) 25 N. Y. Supp. 200; 7 Harv. Law Rev. 311; Crowe v. Ballard (1790) 1 Ves. 215.

2. In Rogers v. Ingham (1876) 3 Ch. D. 351 there was apparently express ratification.

3. Bedier v. Reaume (1893) 95 Mich. 518, 55 N. W. 366; vendor barred because she had sold her mortgage; Dennis v. Jones (1888) 44 N. J. Eq. 513, 14 Atl. 913; vendees barred because they dealt with the property as owner. But in Montgomery v. Pickering (1874) 116 Mass. 227 the execution of a deed in accordance with the plaintiff's contract was held no bar to rescission because "it was required by the terms of the original contract, and there is nothing to show an intention to forgive the fraud. To have effect as a confirmation such deed must appear to have been given with that intention by one who was not under the influence of the previous transaction."

4. Parsons v. McKinley (1894) 56 Minn. 464, 57 N. W. 1134.

5. Sanger v. Wood (1818) 3 Johns Ch. 416; 7 Harv. Law Rev. 311.

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1. See *ante* § 379.

mechanically by denying relief where for any reason restoration has become impossible;[2] and, as in mistake cases, the better view and prevailing tendency is that nothing more than substantial restoration is ever required,[3] and that lack of this may be excused.[4] If what the plaintiff has received from the defendant has clearly become valueless, it is unnecessary to return it.[5] Since an equity court may make a conditional decree it is not indispensable that the plaintiff should tender restitution at or before suit;[6] and in some cases of rescission at law the plaintiff—not having tendered restitution—has been allowed to recover with a de-

2. Laguras Nitrate Co. v. Laguras Syndicate (1899) 2 Ch. Div. 392. See criticism 13 Harv. Law Rev. 410.

3. Niblett v. McFarland (1875) 92 U. S. 101; 28 Harv. Law Rev. 315-317.

4. For example, if the defendant's own act prevents restoration; Hammond v. Pennock (1874) 61 N. Y. 145; Brown v. Norman (1888) 65 Miss. 369, 4 So. 293: "From the very moment of the execution of the contract it was impossible for the defendant to be placed in *statu quo* either by the act of complainant or by both his act and the consent of the defendant. The defendant had been a member of a partnership, and his act of selling his interest therein was a dissolution of the firm; he could not again become a member without the assent of Magnum and Butler, over whom neither the defendant nor the complainant had control. By his own act, therefore, a restoration of the *status quo* was impossible."

5. Kent v. Bornstein (1866) 12 Allen 342 (counterfeit bill); Martin v. Home Bank (1899) 160 N. Y. 190, 54 N. E. 717 (worthless check). But in Carlton v. Hulett (1892) 49 Minn. 308, 51 N. W. 1053, the court ordered the reconveyance of a worthless tax title because "there may be some collateral rights or interests which will be protected or made available thereby."

6. Reynolds v. Waller's Heir (1793) 1 Washington (Va.) 164; Brown v. Norman (1888) 65 Miss. 369, 4 So. 293. In Thackrah v. Haas (1896) 119 U. S. 499 the defendant had fraudulently extorted from the plaintiff $80,000 worth of mining stock by harassing him for a debt of $1,200. The plaintiff asked rescission but had no means of raising $1,200 except the mining stock. The court took care of this in the final decree. In the somewhat similar case of Rigdon v. Walcott (1892) 141 Ill. 649, 31 N. E. 158, the court refused to excuse the tender, dealing with the matter in a mechanical way.

duction made for the amount of money which he is under obligation to restore.[7]

There is one anomalous exception to the rule requiring restitution by the plaintiff, namely, where rescission of a life insurance policy is asked for by the insured; in such cases he has been allowed to recover the full amount of the premiums paid tho the policy was binding upon the company and therefore the plaintiff had received benefit[8] from the insurance. Whether this anomaly has been due to a confusion with cases where the policy was not binding on the company or to a failure to see that a live plaintiff has really received any benefit, is not clear.[9]

§ 395. Rescission at law —trover—replevin—assumpsit.

If the effect of the defendant's fraud is to benefit the defendant the plaintiff is not limited at law to an action on the case for deceit. If the plaintiff has been induced to part with money he may recover in indebitatus assumpsit based upon the quasi contractual obligation to make restitution for the unjust enrichment.[1] If he has been induced to part with chattels other than money he may recover either in trover for the value of the chattels[2] or replevin for the chattels themselves.[3]

7. Page Belting Co. v. Prince & Co. (1914) 77 N. H. 309, 91 Atl. 961, 28 Harv. Law Rev. 317. See also Woodward, Quasi Contracts § 265. In Farwell Co. v. Hilton (1898) 84 Fed. 293, the defendant had made a payment on account and then sold part of the goods to a *bona fide* purchaser. The plaintiff was allowed to replevy the goods still retained by the defendant without tendering back the money received on account. Unless the amount paid greatly exceeded the value of the goods sold by the defendant the case seems thoroughly sound; see 12 Harv. Law Rev. 65.

8. Heddon v. Griffin (1883) 136 Mass. 229.

9. See 22 Harv. Law Rev. 134. And see Woodward, Quasi Contracts § 265.

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1. Brown v. Montgomery (1859) 20 N. Y. 287.

2. Thurston v. Blanchard (1839) 22 Pick. (Mass.) 18.

3. Hotchkin v. Third Nat. Bk. of Malone (1891) 127 N. Y. 329; 16 Harv. Law Rev. 159.

The common explanation of this is that the plaintiff can, by rescinding the sale, place title back in himself;[4] but since this right is cut off by a transfer to a *bona fide* purchaser for value[5] it is clear that the right is equitable rather than legal; and it would therefore be more accurate to say that trover and replevin are being used to redress the equitable right to get back the chattel.[6] If the chattel has been sold by the defendant the plaintiff also has his election to recover for the amount received by the defendant on the sale.[7] As already stated,[8] the prevailing view in the United States is that equity courts will not give relief in fraud cases where the common law remedy is now adequate; hence in the cases discussed in this section the plaintiff must content himself with an action at law.

§ 396. Conveyances in fraud of creditors.

Fraudulent conduct does not require the making of representations. If a debtor conveys away his property with intent to prevent his creditors from levying upon the property for the satisfaction of their claims, this is fraud, and while the debtor himself is unable to attack

4. See Williston, Sales § 649.

5. In an analogous way the action of ejectment might logically have been used to redress the equitable right to get back land from a fraudulent vendee; the obstacles preventing this were probably the registry system of land trnsfers and the fact that while the prevailing method of transferring chattels *inter vivos* is by delivery, the almost universal method of transferring land is by deed; only a court of equity could compel the defendant to execute a deed of reconveyance.

6. Thurston v. Blanchard (1839) 22 Pick. (Mass.) 18; Farwell Co. v. Hilton (1898) 84 Fed. 293.

7. Woodward, Quasi Contracts § 278. Even tho the defendant has not sold the goods he should be liable in indebitatus assumpsit for the value of the goods, but on this point there is a conflict of authority; Woodward, Quasi Contracts § 273.

8. See *ante* § 380.

the transaction,[1] his creditors may do so,[2] unless the transferee has paid value in good faith without notice of the debtor's fraudulent intention.[3] Very early this remedy seems to have been entirely in equity but the Statute of Elizabeth[4] provided that the creditor might proceed with his common law remedies as if no transfer had been made. The statute apparently did not take away the equitable remedy and if the creditor is in any doubt as to being able to prove the fraud, it is safer to proceed in equity;[5] if he proceeds at common law and is unable to prove the fraud, he becomes liable in tort to the transferee.

§ 397. Proof of fraud.

If the plaintiff brings an action on the case for deceit he must allege and establish the essentials therefor already discussed.[1] Generally, the rule is the same in equity.[2] But where the situation of the parties was such that it seemed very likely that fraudulent means were used equity courts have held that the burden of proof shifted to the defendant. Whether this means the burden of establishing or merely the burden of going forward and explaining, is not clear.[3] There are usually two of the following three elements present in

1. The debbtor is barred by his illegal conduct; Kirby v. Raynes (1903) 138 Ala. 194, 35 So. 118; Williston, Sales § 651.

2. Henney Buggy Co. v. Ashenfelter (1900) 60 Neb. 1, 82 N. W. 118.

3. Copis v. Middleton (1817) 2 Maddock's Ch. 410. In Thomas v. Beals (1891) 154 Mass. 51 the only fraud chargeable against the grantee was the payment of an inadequate price; a reconveyance was ordered upon repaying the price to the grantee.

4. Statute 13 Eliz. 15 (1570).

5. This is one of the three kinds of creditor's bills; see *post* § 455.

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1. See *ante* § 381.

2. Or in other common law actions, such as trover, replevin or assumpsit; see *ante* § 395.

3. See Wigmore, Evid. § 2503.

such cases: (1) the plaintiff in financial distress;[4] (2) sale at an inadequate price;[5] (3) defendant a fiduciary[6] or possessing some other advantage over the plaintiff.[7] If only one of the three elements is present, rescission will usually be refused.[8]

D. Duress and Undue Influence.

§ 398. Duress on the plaintiff.

If instead of using deception to attain his ends the defendant uses constraint to induce the plaintiff to part with property[1] or to enter into an obligation,[2] equity will just as readily give rescission as in fraud cases. Even in early common law duress was recognized as a defense to contracts, but the notion of duress was limited to peril of life or limb; this was later extended so as to include such threats as would put in fear a person of ordinary firmness.[3] The equity rule is at least as liberal to plaintiffs.[4] For example, in

4. The plaintiff's need of money was a large element in Earl of Ardglasse v. Muschamp (1684) 1 Eq. Cas. Abridged c. pl. 1, 169 (expectant heir); Summers v. Griffiths (1866) 35 Beav. 27 (plaintiff an illiterate woman).

5. Inadequacy of price was an element in Butler v. Haskell (1816) 4 Desaussure 650; Summers v. Griffiths, *supra*, and see 13 Col. Law Rev. 648 on inadquacy of price in judicial sales.

6. Butler v. Haskell, *supra*.

7. Plaintiff an illiterate old woman, Summers v. Griffiths, *supra*.

8. For example, the mere fact that the defendant knew the value of the land and the plaintiff did not, is not a sufficient basis for rescission; Harris v. Tyson (1855) 24 Pa. St. 347; nor is the mere fact that the plaintiff was necessitous; Batty v. Lloyd (1882) 1 Vernon 141.

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1. Brown v. Pierce (1868) 7 Wall. 205.

2. Thomas de York v. Thomas de Crop (1337) Selden, Select Cases in Chancery No. 134.

3. U. S. v. Huckabee (1872) 16 Wall. 414.

4. Since in duress cases the defendant is actually desiring the plaintiff to act, there seems to be no reason why the objective standard should be applied; even if the plaintiff is not a person of ordi-

Morse v. Woodworth,[5] rescission was given because of threats of imprisonment for embezzlement. But fear of financial ruin,[6] fear of delay in collection of a claim against the defendant,[7] and threat of civil action[8] have been held an insufficient ground for rescission.[9]

§ 399. Duress on third persons.

Ordinarily duress on a third person affords a plaintiff no basis for relief. But where the relationship between the plaintiff and the third person is very close so that the plaintiff is really constrained to enter the transaction because of the duress, equity will grant rescission. Most, if not all, of the cases are cases where there is a close family relationship;[1] thus rescission has been given to a parent because of duress on a child,[2] to a wife for duress on her husband,[3] to a

nary firmness, he ought to be given relief if he actually was unlawfully constrained; see 22 Harv. Law Rev. 53.

5. (1891) 155 Mass. 233, 27 N. E. 1010, 29 N. E. 525.

6. Hackley v. Headley (1881) 45 Mich. 569, 8 N. W. 511.

7. Secor v. Clark (1889) 117 N. Y. 350, 22 N. E. 754.

8. Dunham v. Griswold (1885) 100 N. Y. 224, 3 N. E. 76.

9. Submitting to a new and different contract because of need of money was held insufficient in Silliman v. U. S. (1879) 101 U. S. 465; and in Girty v. Standard Oil Co. (1896) 37 N. Y. Supp. 369, the threats of the plaintiff's husband to commit suicide were held not to constitute duress; see 10 Harv. Law Rev. 62.

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1. Tho the existence of some family or blood relationship is not enough in itself to show that the plaintiff was really influenced.

2. In Neilson v. McDonald (1822) 6 Johns. Ch. 201 the defendants caused the plaintiff's personal property to be sold at execution at small prices, demanding specie, in order to induce the plaintiff to give a mortgage assuming the debts of his insolvent son. In York v. Hinkle (1891) 80 Wisc. 624, 50 N. W. 895, the defendants threatened to prosecute the plaintiff's son for forgery if the plaintiff would not assume the son's debt.

3. City Nat'l. Bank of Dayton v. Kusworm (1894) 88 Wisc. 188, 59 N. W. 564 (husband very ill).

sister for duress on her brother[4] and to an aunt for duress on a nephew to whom she was much attached.[5]

§ 400. Undue influence.

Even if neither fraud nor duress is used by a defendant a transaction may be rescinded because of what is ordinarily called undue influence.[1] The rule has been thus stated:[2] "Any undue influence brought to bear upon a person entering into an agreement, or consenting to a disposal of property, which, having regard to the age and capacity of the party, the nature of the transaction and all the circumstances of the case, appears to have been such as to preclude the exercise of free and deliberate judgment." Most of the cases are cases of gifts to persons who because of close family or fiduciary relationship are in a position to exercise strong influence on a donor who is very old,[3] or diseased,[4] or very young.[5] Where these circumstances are shown it is usually said that the defendant must prove that no undue influence was exerted.[6] Gifts

4. Kronmeyer v. Buck (1913) 258 Ill. 586, 101 N. E. 935. (threat to send brother to jail).

5. Town of Sharon v. Gager (1878) 46 Conn. 189.

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1. Occasionally it is included under a widened meaning of duress; Williston, Sales § 659.

2. Wald's Pollock, Contracts, (3rd. Ed.) 732.

3. Haydock v. Haydock (1881) 33 N. J. Eq. 484 (gift from infirm husband of seventy-five to wife of fifty-five); Greene v. Roworth (1889) 113 N. Y. 462, 21 N. E. 165 (gift from infirm father of seventy-six to sons between forty-five and fifty).

4. Morley v. Loughman (1893) L. R. 1 Ch. 736 (gift from epileptic to one who had acquired religious influence over him).

5. Ashton v. Thompson (1884) 32 Minn. 25, 18 N. W. 918 (gift from daughter to mother and uncle who had been her guardians, made fourteen months after her majority.)

6. In Knox v. Singmaster (1888) 75 Iowa 64, 39 N. W. 183, the defendant, who had received property from his daughter shortly after her majority, was able to convince the court that no undue influence had been used.

from clients to attorneys are closely scrutinized and are usually set aside if the client did not have independent professional advice.[7]

E. Illegality.

§ 401. In general—unlawful cohabitation.

The effect of illegality[1] upon rescission varies; much turns upon the seriousness of the illegality, upon whether the transaction has been completed or not, and upon whether the parties are in *pari delicto;* if illegality consists in the violation of a statute, courts will give or refuse relief depending upon the fundamental purpose of the statute. A number of the cases where the plaintiff seeks rescission in equity of a transaction tainted with illegality are cases which involve unlawful cohabitation. If property has been transferred in consideration of future cohabitation, equity will not cancel the deed or order a reconveyance[2] unless it be shown that the plaintiff at once

7. Dunn v. Dunn (1886) 42 N. J. Eq. 431, 7 Atl. 842; Liles v. Terry (1895) L. R. 2 Q. B. 679 (gift to wife of attorney by a spinster of seventy-seven).

1. For a discussion of the effect of illegality upon contracts for the sale of chattels, see Williston, Sales § 663—681. As to the recovery in quasi contract by a plaintiff who has misrelied on an illegal contract, see Woodward, Quasi Contracts §§ 132-153.

2. Batty v. Chester (1842) 5 Beav. 103; the plaintiff formed an illicit connection with the defendant, a woman of immoral conduct, and executed a deed making a permanent provision for her; the plaintiff asks cancellation because the defendant left the plaintiff to live with another man. See also Smyth v. Griffin (1843) 13 Simons 245; the plaintiff cohabited with M. S., a married woman, and in consideration of future cohabitation granted to her an annuity to begin at his death, marriage, or withdrawing his protection; and to secure the annuity he executed a warrant of attorney to enter up judgment. The plaintiff married and M. S. sued on the judgment. The plaintiff asked that the deed and bond be cancelled. In another case which might well have been decided on the ground of illegal conduct of the grantor, equitable relief was refused on

abandoned the immoral purpose.[3] If a bond has been executed in consideration of future cohabitation, equity might either give cancellation on the ground that it is thus merely enabling the plaintiff to make good his common law defense to the bond[4] or it might deny cancellation on the same grounds that it denies cancellation of a conveyance of property.[5] Where the bond is voluntary, the fact that the obligee is a prostitute is legally immaterial.[6]

§ 402. Gambling—marriage brocage.

If the loser in a gambling transaction gives to the winner a check for the amount lost, it would seem that public policy would be best served by allowing the loser to stop the payment of the check and by awarding him cancellation thereof; this is because he is in substance a defendant until payment of the check is actually made; hence cancellation simply preserves and in-

the ground of laches; Ayerst v. Jenkins (1873) 16 Eq. Cas. 275. In this case H induced the defendant, who was his deceased wife's sister, to cohabit with him under color of a fictitious marriage. Two days before the marriage ceremony H conveyed shares to trustees for the defendant. H lived only four months and the defendant had remarried without a settlement. The plaintiff argued unsuccessfuly that relief should be given in order to discourage such marriages.

3. Sismey v. Eley (1849) 17 Simons 1: "Now it does not appear that the plaintiff has done any illegal or immoral act in consequence of the promise and expectation made and held out to him by the defendant: but, on the contrary, it appears that the connection between him and the defendant terminated on the execution of the deed; and therefore I do not see why this court should not interfere in his behalf."

4. See dictum in Whaley v. Norton (1687) 1 Vernon 483. See *post* § 408.

5. This would leave the bond in existence but the holder thereof ordinarily unable to realize thereon; the former is the better doctrine.

6. Hall v. Spncer (1767) Ambler 641.

sures to him his common law defense.[1] Relief has, however, occasionally been refused,[2] on the very artificial and mechanical ground that the plaintiff must allege the illegal transaction in order to make out a *prima facie* case.[3]

A bond given in a marriage brocage contract is not enforcible and hence equity will ordinarily cancel the bond in order to preserve the obligor's common law defense.[4] And some courts have gone still further and allowed recovery of property or money paid on the ground that the prohibition is aimed at the defendant alone and that public policy will be best served by giving full protection to the paintiff.[5]

F. BREACH OF CONTRACT.

§ 403. In general—conveyance of land for support.

Whether a grantor of land may get the land back because of the failure of the grantee to perform his part of the agreement would seem properly to depend upon the fundamental question of the adequacy of the common law remedy. If the grantee merely promised to pay money, the seller is considered as having an adequate remedy in an action for the purchase price.[1]

1. Newman v. Franco (1795). 2 Anstruther 519; 2 Ames Eq. Cas. 120. And see Woodward, Quasi Contracts § 152.

2. Kahn v. Walton (1889) 46 O. St. 195, 20 N. E. 203 (suit to enjoin bank from paying the checks.)

3. For a criticism of this test see Sampson v. Shaw (1869) 101 Mass. 145, 151. As pointed out by Professor Keener, 3 Keener's Equity Cases, 869, such a test would practically eliminate such cases since the plaintiff nearly always must show the illegal transaction.

4. Hall v. Potter (1695) Shower's Parliament Cases 76; 5 Col. Law Rev. 550. And for a statement of the question of public policy, see Cole v. Gibson (1750) 1 Ves. Sr. 503, 506.

5. Duval v. Wellman (1891) 124 N. Y. 156, 26 N. E. 343; Woodward, Quasi Contracts § 151.

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1. In a minority of jurisdictions the vendor is given an

But where the promise of the grantee was to do something else than to pay money and the common law remedy for breach would for any reason be inadequate equity properly gives rescission and orders a reconveyance. The most common illustration is that of a conveyance of land by an aged person in exchange for support during the rest of the grantor's life.[2] In such a case not only are the damages conjectural because of the uncertainty of the duration of the grantor's life, but if the homestead has been conveyed, there are additional reasons of sentiment for giving rescission. If the grantor has received benefit by part performance the grantee should, of course, be compensated therefor.[3] Similarily if the defendant's promise was to convey land in exchange and he is unable to do so, the plaintiff is entitled to rescission.[4]

§ 404. Rescission to a grantee.

Ordinarily a grantee who accepts a conveyance of land[1] is not entitled to rescission for mere breach of

equitable lien for the purchase price, which enables him to have the land sold in order to satisfy the lien. In the majority of jurisdictions he must bargain for security if he wishes it.

2. Lowman v. Crawford (1901) 99 Va. 688, 40 S. E. 17; 15 Harv. Law Rev. 581; 22 *id.* 62; 14 *id.* 319 note 2; 12 *id.* 559.

3. Rescission was also given in Savannah etc. Ry. Co. v. Atkinson (1894) 94 Ga. 780, 21 S. E. 1010, where defendant railroad's promise was to construct its road; in Michel v. Hallheimer (1890) 56 Hun 416 where defendant had promised to build tenement houses; and in Pironi v. Corrigan (1891) 48 N. J. Eq. 607, 23 Atl. 355 where the defendant had promised to secure a separation for the plaintiff from the plaintiff's husband. In Brewster v. Lanyon Zinc Co. (1905) 140 Fed. 801 the plaintiff leased gas and oil rights to the defendant who neglected to develop production. The plaintiff asked for and obtained cancellation of the lease under a forfeiture clause; see 6 Col. Law Rev. 467.

4. Bell v. Hutchings (1891) 86 Ga. 562, 12 S. E. 974.

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1. If he has not accepted the deed he may rescind for failure of title; Stanton v. Tattersall (1853) 1 Sm. & G. 529; unless the failure is so small as to entitle the vendor to specific performance with compensation. See *ante* § 121.

warranty of title;[2] he must content himself with an action at law for damages. But if a judgment for damages would be inadequate because of the insolvency of the grantor, rescission will be granted.[3]

Similar reasoning applies to other promises made by the grantor. In Rackeman v. River Bank Improvement Co.[4] the agent of defendant land company sold and conveyed a lot to the plaintiff, agreeing without authority to sell no lots at a smaller price. The defendant later sold lots to others at a smaller price and the plaintiff, offering to reconvey, asked rescission of the transaction and a cancellation of his notes and mortgage. It was held that the company must reject or ratify the transaction in its entirety and the breach of the promise entitled the plaintiff to the desired relief; it is obvious that in such a case damages would be inadequate because conjectural.[5]

2. Gale v. Conn (1830) 26 Ky. 538; Edwards v. McLeay (1815) George Cooper's Chancery 308.

3. Matthews v. Crowder (1902) 111 Tenn. 737, 69 S. W. 779; 16 Harv. Law Rev. 224.

4. (1896) 167 Mass. 1, 44 N. E. 990; 10 Harv. Law Rev. 315.

5. A somewhat similar case is presented in the field of insurance. In Black v. Sup. Council, Amer. Legion of Honor (1902) 120 Fed. 580, the plaintiff had taken out a life insurance policy in a mutual benefit association for $5000. Some years later the company partly repudiated their contract by passing a by-law making $2000 the maximum amount payable on any policy. Rescission was allowed without any compensation to the insurance company for the risk which they had undergone. Tho the case represents the weight of authoriey on the point of compensation, it is not the better view; see 16 Harv. Law Rev. 600; *ante* § 394.

CHAPTER VIII.

Bills Quia Timet and to Remove Cloud on Title.

A. Cancellation of Contracts.

§ 405. Scope of bills quia timet.

The literal meaning of the phrase *quia timet* is *"because he fears;"* hence taken literally, without any modifying words, bills *quia timet* would include many bills in equity which are never thought of as *quia timet;* for example, in bills for specific performance it may truthfully be said that the plaintiff fears that the defendant will not perform his promise.[1] It would certainly include cases where the plaintiff is seeking to prevent injury to his property through a threatened trespass or nuisance, and occasionally the term is thus used.[2] In a narrower sense of fearing litigation it would still include bills of interpleader and bills of peace, but the latter are usually treated separately, as in this book.[3] It is quite common to use the phrase to include bills to remove cloud on title;[4] but since the

1. Apparently the phrase is never applied to any specific performance cases, but it might very appropriately be used where before the time set for performance the plaintiff reasonably fears that the defendant will convey the property to a *bona fide* purchaser and asks that he be enjoined; see *ante* § 89.

2. Fletcher v. Bealey (1885) 28 Ch. D. 688; in refusing an injunction against the defendants allowing vat waste to get into the river the court said: "I think there is not sufficient on this part of the case to sustain a *quia timet* action."

3. See *post* Chap VIII and IX.

4. Professor Ames has so classified it; 2 Ames Eq. Cas. Chap. VIII. See also Contee v. Lyons (1890) 19 D. C. 207. "This was a bill *quia timet* in which the complainant sought to have an alleged cloud on their title removed."

injury sought to be redressed in such a bill is usually, if not always, a present injury to marketability and not merely a threatened future injury, it seems clearer to classify it separately.[5] In the most narrow sense bills *quia timet* include only those bills which seek relief against the effect of a possible loss of evidence in an existing or threatened litigation, or against the transfer of a negotiable instrument.

§ 406. Equitable defenses arising at inception of contract.

In the previous chapter were discussed not only the rescission of transfers of property but also the rescision and cancellation of contracts which the plaintiff had executed because of fraud, illegality, etc. This was because originally one who had executed a sealed contract but had a defense of fraud, or of illegality not appearing on the face of the instrument was just as much in need of equitable relief as if he had been induced by fraud to convey property.[1] Having at that time no common law defence to an action on the contract, his sole relief was to get a perpetual injunction against the enforcement of the contract and as an incident thereto, the court would order the contract to be delivered up and cancelled in order to make the relief complete.[2] As to contracts not under seal, apparently the defences of fraud and illegality could always be shown at common law; but equity extended its jurisdictions of cancellation—probably unconsciously—to include them.[3] And furthermore, even if the

5. See Sharon v. Tucker (1892) 144 U. S. 533.

1. Specialty Contracts and Equitable Defenses, by Professor Ames, 9 Harv. Law Rev. 48-59.

2. As to illegality not apparent upon the face of the instrument, see Law v. Law (1735) 3 P. Wms. 391; as to fraud, see Gale v. Linds (1687) 1 Vernon 474.

3. Newman v. Franco (1795) 2 Anstruther 579, 2 Ames Eq. Cas. 120 (bill of exchange for money won at play); Buxton v. Broad-

defenses of fraud and illegality may now be shown at law[4] in an action on a sealed contract, equity still retains its jurisdiction of cancellation,[5] without regard to the existence of *quia timet* grounds for relief.

§ 407. Equitable defenses arising after inception of contract.

The history of defenses arising after the inception of a sealed contract—such as payment, failure of consideration, discharge of a surety,[1] etc., is substantially the same as that of defences arising at the inception.[2] But for some apparently unexplained reason, the equitable jurisdiction of cancellation was not extended as to such defenses to instruments not under seal. In Brooking v. Maudslay[3] the plaintiff had insured the defendant's cargo of machinery, and both ship and cargo were lost; the plaintiff asked that the insurance policy be cancelled on the ground that the ship was sent to sea in an unseaworthy condition. In denying relief: "If the policy were liable to be completely avoided, as, for example, if it had been obtained by misrepresentation, a court of equity would have jurisdiction to direct the delivery up and cancellation of the instrument. . . . On the other hand, where the policy cannot be so avoid-

way (1878) 45 Conn. 540; 2 Ames Eq. Cas. 115 (nonnegotiable note obtained by fraud).

4. As to illegality the rule was changed by Collins v. Blantem (1767) 2 Wils. 341. As to fraud the rule was changed in England by the Common Law Procedure Act of 1854.

5. Andrews v. Berry (1795) 3 Anst. 634. In Pacific Mutual Life Ins. Co. v. Glaser (1912) 245 Mo. 377, 150 S. W. 549 an insured innocently but falsely warranted that he had never been refused insurance; the effect of this was that the company never became bound by the policy and hence the giving of cancellation on the ground of mistake seems unsound; but the decision is justified on *quia timet* grounds; see 26 Harv. Law Rev. 366.

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1. See 9 Harv. Law Rev. 48, 52.
2. See *ante* § 406.
3. (1888) 38 Ch. D. 636; 2 Ames Eq. Cas. 128.

ed, but there is a good legal defence to an action upon it (as, for example, deviation) a court of equity cannot make a decree for cancellation.'"[4]

§ 408. Real defenses to contracts—jurisdiction quia timet.

Real[1] defenses, such as forgery, have always been available at law even in actions on sealed contracts; such contracts are usually called void, as distinguished from contracts with personal or equitable defenses arising at the inception of the contract, which have already been discussed;[2] the latter are called voidable contracts.

When the contract is void on its face so that the supposed obligor will have no difficulty in making out his, defense whenever action may be brought against him, he does not need the aid of a court of equity[3] unless the contract is a cloud upon the title to some of his property.[4] But where the contract, tho void, is apparently valid on its face the supposed obligor may need equitable relief; for example, if no action has been brought at law and the Statute of Limitations has a long period to run, he may be in very real peril of being unable to prove his defense if the holder of the instrument should delay suing for a long time. Where, under all the circumstances, there is a reasonable fear of thus losing the benefit of one's defense,

4. See also Thornton v. Knight (1848) 16 Sim. 509.

1. As distinguished from personal or equitable defenses discussed in the two preceding sections.

2. See *ante* § 406. These defenses are called personal because they are not available against every person, since a *bona fide* purchaser for value before maturity is protected. In this sense infancy and coverture are not personal defences but real defences. Infancy is a personal defence only in the sense that it can not be taken advantage of *by* any one else.

3. Simpson v. Howden (1837) 3 Mlyne and Craig 97, 2 Ames Eq. Cas. 124; (agreement illegal and void on its face).

4. See *post* §§ 413-419.

equity should cancel,[5] but the courts have not yet fully come to that position.[6] The fact that cancellation of voidable instruments has been given as a matter of course without reference to possible *quia timet* grounds[7] has apparently blinded the courts to the need of cancellation of void instruments where there are *quia timet* grounds for relief.

§ 409. Inadequacy of bill to perpetuate testimony.

In many of the cases where the cancellation of void instruments has been refused tho there were apparently *quia timet* grounds, the suggestion is made that the plaintiff has an adequate remedy in a bill to perpetuate testimony or its statutory equivalent.[1] While

5. In Fuller v. Percival (1879) 126 Mass. 381, 2 Ames Eq. Cas. 111, the plaintiff's intestate and defendant G. Percival had been partners; G. P. gave negotiable notes in the name of the partnership without the authority of his partner. In awarding cancellation to the plaintiff: "The notes are in the possession of a fraudulent holder who has demanded payment of the plaintiff; they are negotiable, and although overdue may be sued by such holder, or by others to whom he may hereafter transfer them, to the embarrassment of the plaintiff, and no suit at law has yet been commenced upon them. . . . The plaintiff cannot try the question of partnership liability at law until such time as John P. T. Percival (the holder) may see fit to bring his action. . . . And, upon the whole, we are of opinion that the plaintiff is entitled to the relief he seeks. It is more effectual than it can be at law, because it is more speedily afforded, and enables the plaintiff to protect himself before the evidence is lost."

6. See 16 Harv. Law Rev. 222, criticising the refusal of relief in Vanatta v. Lindley (1902) 198 Ill. 40, 64 N. E. 735.

7. Occasionally courts use the *quia timet* argument in cases where equity has retained its historical jurisdiction; McHenry v. Hazard (1871) 45 N. Y. 580, 2 Ames Eq. Cas. 118; note procured by fraud: "The defendants could not, at their election, postpone the litigation of the question, and subject the plaintiff to the vexation of a litigation at a distant period, when the means of defence might be lost or impaired, and when he might be disabled from contesting the validity of the claim with the same ability as at the present time."

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1. Allerton v. Belden (1872) 49 N. Y. 373, 2 Ames Eq. Cas. 113; the plaintiff asked cancellation of a usurious note upon which he was an accommodation indorser; in denying relief: "The only facts upon

the perpetuation of testimony would in some cases not only be valuable but effective, it can hardly be reasonably contended that such evidence—which is usually read by the court stenographer—is an adequate substitute for the testimony of the witnesses themselves.[2] Nor can it be reasonably contended that an equity court should not by compelling an immediate trial take away the right of the holder to wait till the Statute of Limitations has almost run before bringing his action. It is doubtful if he has any such right to wait; but even tho he has, equity may very properly prevent him from using such right vexatiously or oppressively.

§ 410. Injunction against transfer of negotiable instruments.

If the instrument is negotiable and not yet due and the defense is merely personal, the equity plaintiff needs not only cancellation but also an immediate injunction against its transfer so as to prevent his defense from being cut off by the instrument getting into the hands of a *bona fide* purchaser.[1] Tho the doctrine

which the plaintiff bases his claim to relief are that the defendant Belden refuses to bring an action and that the witnesses to prove the usury may die, and also that the property which is mortgaged to the plaintiff as indemnity is deteriorating in value. There is nothing in these allegations showing any occasion for an action of this description. If the complaint is true the plaintiff has no need of indemnity. If he is apprehensive that his witnesses may die, he may perpetuate their testimony under the provision of the Revised Statutes. If the danger of death of witnesses were a sufficient ground for an action for relief, every case of usury where the lender has not sued at law may be brought by the borrower into a court of equity."

2. The fact that for a long time trial in all equity cases was by deposition—and that therefore there was little or no advantage in that respect of cancellation over the perpetuation of testimony—no doubt has contributed to the slowness of the courts in fully recognizing *quia timet* grounds for cancellation.

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1. Moeckly v. Gorton (1889) 78 Iowa 202, 42 N. W. 648 (note given to avoid prosecution). In Smith v. Aykwell (1747) 3 Atk. 566, 2

of *lis pendens* does not apply to negotiable instruments[2] yet the fear of being punished for contempt of court, together with the publicity connected with the giving of the injunction will usually prevent the loss of the plaintiff's defense. If a *bona fide* purchaser would not be protected either because the note is overdue or because the defense is a real defense,[3] but there are *quia timet* grounds for cancellation, a preliminary injunction against transfer might well be given in order to expedite the plaintiff's suit for cancellation.[4] But courts that refuse to cancel on *quia timet* grounds will in such cases of course refuse an injunction.[5]

§ 411. Effect of pendency of an action at law.

If the holder of the instrument has already brought an action at law thereon and the law defendant may prevent him from dismissing[1] there is no real need of

Ames. Eq. Cas. 132, a negotiable note had been given by the plaintiff to the defendant to procure the plaintiff a marriage. The plaintiff was given, on motion, a temporary injunction against the transfer of the note; the report of the case in 3 Atkyns says that the plaintiff asked for and was refused an injunction against any action at law on the note but in the report of the same case in Ambler 66, (*sub nom.* Smith v. Haytwell) there is nothing of this. No reason appears why the plaintiff might not have had upon the final hearing cancellation upon historical grounds, the illegality not appearing on the face of the note; see *ante* § 406.

2. Winston v. Westfeldt (1853) 22 Ala. 760.

3. Or because the instrument was a non-negotiable one.

4. The only danger is that the equity plaintiff might be unable to find out who the transferee is; if a transfer is made pending his suit for cancellation, he may at once have the transferee made a party.

5. Reilly v. Tolman (1894) 58 Ill. App. 588 (note usurious and past due).

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1. In the Federal courts a plaintiff does not have an absolute and unqualified right to dismiss; Stevens v. The Railroads (1880) 4 Fed. 97. This seems to be the explanation of the decision in Grand Chute v. Winegar (1872) 15 Wall. 373, 2 Ames Eq. Cas. 116, in which the equity court refused cancellation of bonds obtained by fraud because an action at law had already been brought; "A judgment against

cancellation; but if he cannot be so prevented and the law defendant can show that there is reasonable fear of such dismissal, then the previous bringing of such action at law should be no bar to cancellation.[2]

If the action at law is brought after the suit in equity has been begun, the equity court might either enjoin the action at law and give cancellation on the ground that the court which first takes jurisdiction is entitled to keep it; or it may, as a matter of convenience, merely suspend the giving of relief till it be seen whether the law plaintiff will prosecute his action diligently. The latter seems to have been the situation in Hoare v. Bremridge[3] where the court refused to enjoin the action but apparently did not dismiss the plaintiff's bill. At that time trial in an English equity court was still by deposition;[4] at the present time, when trial in

Winegar in the suit brought by him would be as conclusive upon the invalidity of the bonds, would as effectually prevent all future vexatious litigation, would expose the fraud, and prevent all future deception as thoroughly and perfectly as would a judgment in the equity suit."

2. In Buxton v. Broadway (1878) 45 Conn. 540, 2 Ames Eq. Cas. 115: "If the petitioner could compel the respondent to prosecute to final judgment the suit he has commenced on the note in question, then it might be said with truth that he has adequate remedy at law for the grievances set forth in his bills. But the petitioner has no such power over the respondent or the suit; neither does the law furnish him any means of acquiring it. The suit is under the entire control of the respondent who may withdraw it at any time before the verdict of a jury or the finding of facts by the court; and, abiding his time, he may take an unconscionable advantage of the petitioner when his witnesses are dead or have been scattered to parts unknown, or when the facts with regard to the fraud shall have faded from their memory." In McHenry v. Hazard (1871) 45 N. Y. 580, 2 Ames Eq. Cas. 118, there was the additional reason for giving relief that the equity plaintiff had been sued by three different persons each claiming to be the owner of the instrument; for a discussion of bills of peace, see *post* Chap. X.

3. (1872) 8 Ch. App. 22, 2 Ames Eq. Cas. 121. See also 17 Harv. Law Rev. 408, 417.

4. "In this case the balance of convenience appears to me clearly to be in favor of the trial at law. It is admitted that it will be more speedy; as far as I can judge, it would be less costly; and also

equity is in open court there seems to be no substantial reason for thus suspending the giving of equitable relief.

§ 412. Conflict between State and Federal decisions.

In Town of Venice v. Woodruff[1] action was brought to have certain bonds issued by the supervisor and railroad commissioners of the Town of Venice, delivered up and cancelled, and in the meantime to restrain transfer. The referee found that the bonds had been issued without the requisite consent of two thirds of the taxpayers. According to New York decisions[2] the bonds were void even in the hands of a *bona fide* holder, but the plaintiff argued[3] that since the Federal courts had held that a *bona fide* holder would be allowed to recover on the bonds the plaintiff should be protected against the possibility of the bonds reaching the hands of a non-resident *bona fide* holder.[4] The court attempted to evade the argument by suggesting[5] that the Federal

that which very properly adverted to by the learned vice chancellor in his judgment, the present course of procedure at law, as compared with that in equity gives an advantage which in cases of this kind is of the greatest value—the advantage of having all the evidence orally taken, and all the cross examination without rehearsal of any kind." Hoare v. Bremridge, *supra*.

1. (1875) 62 N. Y. 462, 2 Ames Eq. Cas. 133.

2. Strain v. Genoa (1861) 23 N. Y. 439.

3. The court definitely refused to recognize ordinary *quia timet* grounds as a basis for cancellation, citing Allerton v. Belden (1872) 49 N. Y. 373, 2 Ames Eq. Cas. 113.

4. A resident *bona fide* holder might change his residence for the purpose of suing in the Federal courts; The Garland (1883) 16 Fed. 283, 288.

5. "But where the effect of a transfer is not to change in any respect the rights or equities of the parties, I am not prepared to hold that the allegation that the transferee might resort to a tribunal in which a rule of decision prevails, or may prevail, differing from that of the court which is asked to enjoin the transfer is sufficient to justify the interference asked. The wrong sought to be prevented by such a proceeding is not any wrongful act of any party, but a decision of another court. . . . If it is a wrong in this case it

court might not protect a *bona fide* holder; but if it should not, it is difficult to see how the present equity plaintiff could be legally damaged by enjoining the the transfer. If the New York court had felt great confidence in the correctness of its own rule in not protecting *bona fide* holders in such cases, it might well have given the relief sought and would probably have done so. Since they refused relief it seems a fair inference that they did not feel sure that the Federal rule was wrong and hence did not feel justified in preventing the bonds from being sued on in the Federal courts. This is one of several instances of unfortunate embarrassment arising from our double system of courts.

B. Bills to Remove Cloud on Title.

§ 413. In general.

In some cases an equity plaintiff may be entitled to cancellation not only on historical[1] and *quia timet*[2] grounds but also because the instrument casts a cloud on his title to some property.[3] But just as the existence of the historical jurisdiction has tended to obscure

must be on the assumption that the federal court will render a decision at variance with the decision of this court. I am of opinion that such an apprehension is not a legitimate ground for the action of a court of equity in restraining a transfer or directing the cancellation of the instrument."

1. See *ante* §§ 406, 407.

2. See *ante* § 408.

3. In Martin v. Graves (1863) 5 Allen 601, 2 Ames Eq. Cas. 137, all three grounds were present. In that case residuary devisees brought a bill against the grantees of land by the testator alleging that the defendants had procured the conveyance by fraud and undue influence; the defendants were not in possession because their interest under the deed was subject to a life estate in the testator's widow who was in possession. Since the deed had been procured by fraud there was historical jurisdiction; see *ante* § 406; there was *quia timet* jurisdiction because the plaintiffs could not sue the defendants at law till the death of the widow, by which time they might lose their evidence

quia timet grounds for cancellation,[4] so the existence of the historical jurisdiction and the partial recognition of *quia timet* jurisdiction[5] has apparently made it difficult for courts always to differentiate this third ground for cancellation.

The origin of giving relief because of cloud on title has been traced to the decision of Lord Eldon in Hayward v. Dimsdale;[6] the existence of the jurisdiction has come to be fairly well recognized but there has been much conflict in the decisions as to the extent of it.

§ 414. What constitutes a cloud on title.

This conflict has chiefly centered about the question as to what constitutes a cloud on title.[1] The correct view, which has been recognized in some jurisdictions,[2] is that any claim which actually does affect marketability by depreciating the market value of the property is a cloud on title, even tho the court which orders the cancellation can easily see that the claim is bad. In

of the fraud; and since the deed purported to convey the plaintiff's land, it was a cloud on their title thereto. In Sharon v. Hill (1884) 20 Fed. 1, 2 Ames Eq. Cas. 161, there were both *quia timet* and cloud on title grounds for cancellation. That was a suit in equity to cancel a forged marriage contract by virtue of which the defendant claimed a wife's interest in the plaintiff's property worth several millions. There were *quia timet* grounds for relief because there was no way in a law court to contest the defendant's claim till the plaintiff's death; and it is obvious that a claim of dower immediately interfered with the marketability of his land and thus became a cloud on title.

4. See *ante* §§ 406, 407.

5. See *ante* § 408.

6. (1810) 17 Ves. 111; see 5 Col. Law Rev. 609.

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1. A cloud on title has been judicially defined as "the semblance of a title, either legal or equitable, or a claim of an interest in lands, appearing in some legal form, but which is, in fact, unfounded, or which it would be inequitable to enforce." See Rigdon v. Shirk (1889) 127 Ill. 411, 19 N. E. 698.

2. Day Co. v. State (1887) 68 Tex. 526, 4 S. W. 865; Jones v. Perry (1836) 10 Yerg. (Tenn.) 59; Linnell v. Batty (1891) 17 R. I. 241, 21 Atl. 606.

other words the test should be the mind of the average purchaser rather than the mind of one learned in the law.[3] Unfortunately, however, the prevailing view is much less liberal to the equity plaintiff; under this view he will fail if the defendant's claim is invalid on its face, or if, altho valid on its face it would fail in an action brought upon it through evidence which the defendant would be compelled to introduce in order to make out his case.[4] The practical difficulty of this lies in the fact that purchasers of land are actually frightened away by the prospect of any litigation, no matter what the chances for winning are.

In a few jurisdictions the rule has become, if possible, even more mechanical and artificial, by making the test of getting cancellation depend upon whether it would be neccessary for the plaintiff in an action by the claimant, to offer any evidence to overthrow the latter's claim.[5]

3. In Missouri relief will be given against instruments whose defects are discoverable only by legal acumen; Merchants' Bank v. Evans (1873) 51 Mo. 335.

4. In Washburn v. Burnham (1875) 63 N. Y. 132, 2 Ames Eq. Cas. 150, A purporting to act as agent for the plaintiff had executed a contract for a conveyance of the plaintiff's land to the defendant. In refusing cancellation: "It is an imperfect, incomplete agreement, and an action brought for a specific performance of it could not be maintained without proof to establish that the attorneys claiming to act on behalf of the principal had power and authority to execute the instrument. . . . He would not make out a cause of action without proof of authority of the attorneys, and in attempting to show this, the alleged want of authority will be made manifest. If authority is shown then clearly there is no cloud. If there is a failure to show it, then there is no cloud." In Bockes v. Lansing (1878) 74 N. Y. 437, 2 Ames Eq. Cas. 152, relief was denied because the plaintiff's record title was superior to the defendant's and therefore the defendant would be compelled to attack the plaintiff's title. See also Scott v. Onderdonk (1856) 14 N. Y. 9, 2 Ames Eq. Cas. 147; in that case there had been a purported sale of the plaintiff's lots not validly assessed; the deed was cancelled but upon the single ground that a statute had made such deeds "*prima facie* evidence of the facts therein recited and set forth."

5. Lytle v. Sandefur (1890) 93 Ala. 396, 9 So. 260; Pixley v.

Either statement of the rule leads to the surprising result of a defendant arguing that his claim is invalid and that he should therefore be left in possession of it.[6] Apparently the only relief from such a situation is in legislation.[7]

§ 415. Requirements of title and possession.

Apart from statute cancellation on the ground of removing cloud on title is limited to one holding legal title.[1] There seems to be no good reason why one whose interest in property is equitable should not have similar relief under similar circumstances, and in some states statutes have been passed extending the scope of the remedy.[2]

If a plaintiff is in possession it is obvious that he cannot bring ejectment against the claimant and the only adequate relief against the cloud is in equity.[3]

Huggins (1860) 15 Cal. 127; 2 Ames Eq. Cas. 153 (semble). For a criticism of this see 18 Harv. Law Rev. 527, 528: "The unfortunate result of such a distinction can best be shown by an illustration. If the plaintiff and the defendant both claim under a deed from the same grantor, the defendant's deed, tho subsequent to that of the plaintiff, is a cloud, because the plaintiff, were his title attacked, would have to introduce evidence of the record. But if the defendant's deed is a forgery, or proceeded from a person outside the chain of title, the instrument, altho valid upon its face, would not be a cloud, because these facts must necessarily appear and destroy the claimant's case without any proof on the part of the plaintiff. Since one may detract as much as the other from the value of the plaintiff's property, such a rule must often work injustice." And see 5 Col. Law Rev. 609, 610.

6. 3 Pom. Eq. Jur. § 1399, cited in Bishop v. Moorman (1884) 98 Ind. 1, 2 Ames Eq. Cas. 156.

7. For an anomalous exception to the anomalous prevailing rule see Bishop v. Moorman, *supra*, where relief was given because the instrument was a sheriff's deed, "under color of official authority."

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1. Frost v. Spitley (1887) 121 U. S. 552; Wood v. Nicholson (1890) 43 Kan. 401, 23 Pac. 587.

2. Oliver v. Dougherty (1902) 8 Ariz. 65, 68 Pac. 553, citing Rev. St. 1887, § 3132.

3. Dull's Appeal (1886) 113 Pa. St. 510, 6 Atl. 504.

It is frequently said that a plaintiff must have possession as well as legal title,[4] but this is not strictly true. If the defendant is in possession and the plaintiff claims to be entitled immediately to possession, there is no reason for the interference of equity[5] because ejectment is ordinarily adequate.[6] But if for any reason ejectment could not have been brought, either because the plaintiff is a reversioner[7] or remainderman,[8] or mortgagee not entitled to possession,[9] or is a mere warrantor of title without any possessory right,[10] or because neither party is in possession,[11] then cancellation is the proper remedy. In some states statutes have been passed making possession wholly immaterial.[12]

§ 416. Inadequacy of other remedies.

In Scott v. Onderdonk[1] the court impliedly suggested that the plaintiff might bring an action for slander of title. But this remedy would not lie except in comparatively rare cases where the claimant has acted in bad faith or officiously;[2] furthermore, even in cases

4. Frost v. Spitley, *supra.*

5. Keane v. Kyne (1877) 66 Mo. 216, 2 Ames Eq. Cas. 144; Moores v. Townshend (1886) 102 N. Y. 387, 7 N. E. 401.

6. In Kruczinske v. Newendorf (1898) 99 Wis. 264, 270, 74 N. W. 974, 1119, the court gave cancellation because "ejectment would merely secure the title and possession, leaving the outstanding deeds and mortgages as clouds on the title." It would seem, however, that the judgment in ejectment would be sufficient protection to the plaintiff; see 3 Col. Law Rev. 357.

7. Keyes v. Ketrick (1903) 25 R. I. 468, 56 Atl. 770.

8. Worthington v. Miller (1901) 134 Ala. 420, 32 So. 748.

9. Horn v. Garry (1880) 49 Wis. 464, 5 N. W. 897.

10. Pier v. Fond du Lac Co. (1881) 53 Wis. 421, 10 N. W. 686.

11. O'Brien v. Creitz (1872) 10 Kan. 202; 2 Ames Eq. Cas. 146; 10 Col. Law Rev. 671. See *contra,* by statute, Randle v. Daughdrill (1905) 142 Ala. 490, 39 So. 162; Ala. Code, 1896, §§ 809, 814.

12. Casey v. Leggett (1899) 125 Cal. 664, 672, 58 Pac. 264, Code Civ. Proc. § 738.

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1. (1856) 14 N. Y. 9, 2 Ames Eq. Cas. 147.

2. Andrews v. Dashler (1883) 45 N. J. Law 167; 13 Col. Law Rev. 23-25.

where it did lie, damages would be inadequate because conjectural; and a judgment in the plaintiff's favor would not necessarily clear the plaintiff's title[3] or convince purchasers.

In Loggie v. Chandler[4] the court in refusing cancellation suggested that the plaintiff might perpetuate the evidence.[5] The discussion of the perpetuation of testimony in connection with cancellation of contracts[6] applies equally here. But the plaintiff not only has a right to be in a position where he may vindicate his title in any future litigation, but also a right[7] to market his property at any time; this latter right is practically not protected at all by the perpetuation of testimony because the result of such a proceeding would probably not reach and almost certainly would not convince prospective purchasers.

§ 417. Title by adverse possession—prevention of cloud.

The fact that the plaintiff's title has been gained by adverse possession for the statutory period is generally held to be no bar to giving cancellation even against the former owner who holds the record title.[1] Conceivably, a court of equity might have refused relief to a plaintiff who had not acted in good faith, on the ground that one who comes into equity should come with clean hands, but there seems to be no trace of

3. For example, if the slanderer did not claim title in himself but in a third person not a party to the action.

4. (1901) 95 Me. 220, 49 Atl. 1059, 2 Ames Eq. Cas. 140.

5. That the mortgage had been paid; since the defense arose after the inception of the mortgage, there was not historical jurisdiction and the court failed to recognize *quia timet* grounds as sufficient basis for cancellation. See *ante* § 408.

6. See *ante* § 409.

7. The right is assumed at common law, but inadequately protected.

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1. Arrington v. Liscom (1868) 34 Cal. 355, 2 Ames Eq. Cas. 142.

2. See McCormack v. Silsbee (1889) 82 Cal. 72, 22 Pac. 874.

such a distinction in the cases, the value of the Statute of Limitations as a statute of repose being recognized in equity as well as at law.[3]

Where a cloud on title is not yet in existence but is likely to be created, equity will interfere to prevent its creation;[4] but relief will be refused as long as its creation is improbable.[5]

§ 418. Cloud on title to personalty—oral and written claims.

That the property involved is personalty instead of realty should logically be no bar to a suit to remove cloud on title.[1] Even tho it be argued[2] that adverse claims usually do not so much impair the value of personalty as of realty, it is hardly a satisfactory reason for denying relief where the plaintiff shows a real injury to marketability.

That the claim made to the property is not evidenced by any written instrument would seem to be no

3. In McCoy v. Johnson (1889) 70 Md. 490, 17 Atl. 387, relief was refused because the question whether the plaintiff had acquired title by adverse possession was one for the determination of a court of law and the constitutional guaranty of trial by jury was involved. In Contee v. Lyons (1890) 19 D. of C. 207 the court confused suits to quiet title in the sense of a bill of peace—see *post* § 445—with suits to remove cloud on title, and denied relief because the plaintiff was not being disturbed; see 18 Harv. Law Rev. 147.

4. King v. Townshend (1894) 141 N. Y. 358, 36 N. E. 513.

5. Clark v. Davenport (1884) 95 N. Y. 477.

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1. Relief was given in Sherman v. Fitch (1867) 98 Mass. 59, 2 Ames Eq. Cas. 141 (mortgage given by corporation now insolvent). See also Stebbins v. Perry Co. (1897) 167 Ill. 567, 47 N. E. 1048, and Homrich v. Robinson (1915) 221 Mass. 308, 108 N. E. 1082; 14 Mich. Law Rev. 76 (chattels stolen from the plaintiff in the hands of the police). See *contra*, State *ex rel.* Kenamore v. Wood (1899) 155 Mo. 425, 446, 56 S. W. 474. In Perry v. Young (1916) 133 Tenn 522, 182 S. W. 577 a cloud on the title to a chose in action was removed; 16 Col. Law Rev. 520, 521.

2. 20 Harv. Law Rev. 421, 422. It is also suggested that "this somewhat extraordinary remedy might be invoked in too many petty

sufficient reason for denying relief because a mere oral claim might conceivably interfere seriously with the marketability of the property.[3] In one case[4] the court gave the curious reason that there was nothing to to cancel. Such an objection merely goes to the form of relief; a decree enjoining the further assertion of the claim would be proper in such a case and might be of great value to the plaintiff.

In Leeds v. Wheeler[5] tho there was no instrument "which upon its face is, or with the aid of extrinsic facts may be, some evidence of a right adverse to the plaintiff's,"[6] the defendant had made his claim in writing and had it recorded. The court was quite right in saying that since the registry statute did not provide for the recording of such a writing it should not have been recorded.[7] But the average purchaser is not an expert on the extent and operation of the registry system[8] and is likely to be considerably influenced by the record of such a claim.[9]

controversies." This seems a rather fanciful objection. If the circumstances are such that the owner may easily remove the chattel and escape the effect of the claim, he will almost certainly do so rather than litigate.

3. Apparently all the cases deny relief. In Parker v. Shannon (1887) 121 Ill. 452, 13 N. E. 155, 2 Ames Eq. Cas. 160, the court suggests that it must be an instrument of record which casts doubt upon the record title.

4. Ashurst v. McKenzie (1890) 92 Ala. 484, 9 So. 262: "nothing could be delivered up and cancelled under the decree of the court undertaking to remove a cloud."

5. (1892) 157 Mass. 67, 31 N. E. 709, 2 Ames Eq. Cas. 159.

6. Nickerson v. Loud (1875) 115 Mass. 94, 97.

7. In Nickerson v. Loud *supra*, the court suggests that the plaintiff's remedy is by an action at law for damages for unlawfully recording, but does not say whether it would be against the recording officer or against the defendant. It is at least doubtful whether a judgment in such an action would convince purchasers.

8. Tho the doctrine of constructive notice does not apply to a writing thus unlawfully recorded, prospective purchasers are very likely to get actual notice thereof.

9. Relief was given in Sanxay v. Hanger (1873) 42 Ind. 44,

§ 419. Form of relief—pendency of ejectment action.

"The form of relief will always be adapted to the obstacles to be removed."[1] If the plaintiff has the record title it will usually be sufficient to require the defendant to deliver up the offending instrument that it may be cancelled or destroyed;[2] but if the instrument itself has been recorded, complete relief would seem to require that the defendant be compelled to execute and have recorded a release of the interest claimed thereby. And if the apparent record title is in the defendant, the plaintiff having acquired title by adverse possession,[3] a conveyance of the title to the plaintiff and the recording thereof would seem to be the proper decree.[4] In any case an injunction against the further assertion of the claim would be appropriate, but where there is no instrument to cancel, it is the only way in which relief can be given.[5] Legislation giving the decree removing the cloud on title an *in rem* effect and directing that the decree itself be recorded in the registry of titles would be highly beneficial, as would also legislation giving equity courts jurisdiction *in rem* in cloud on title cases, so as to reach non-resident claimants.[6]

What has been already said[7] as to the effect of the pendency of an action at law upon a bill for the can-

where the defendant's recorded claim that the plaintiff had no easement had made the plaintiff's land practically unmarketable.

1. Sharon v. Tucker (1892) 144 U. S. 533.

2. As was done in King v. Townshend (1894) 141 N. Y. 358, 36 N. E. 513; and in Hamilton v. Cummings (1815) 1 Johns Ch. 517.

3. See *ante* § 417.

4. But in Sharon v. Tucker, *supra*, the court contented itself with a declaration that the plaintiff's title by adverse possession was complete and with giving an injunction against the defendant's further assertion of title.

5. See *ante* § 418.

6. Statutes of this sort are fairly common. See Title & Document etc. Co. v. Kerrigan (1906) 150 Cal. 289, 88 Pac. 356; 7 Col. Law Rev. 284.

7. See *ante* § 411.

cellation of a contract should apply also to the effect of the pendency of an ejectment action upon a bill to remove cloud on title, but there seem to be very few decisions.[8]

C. Other Quia Timet Relief.

§ 420. The perpetuation of testimony.

Tho the perpetuation of testimony is not an adequate substitute for the cancellation of a contract[1] and practically no substitute at all for the removal of a cloud on title,[2] it may be of considerable value. In

8. In Wilson v. Miller (1905) 143 Ala. 264, 39 So. 178 the defendant had instituted an action of ejectment relying on a forged deed and the plaintiff had then asked for cancellation and an injunction against the action at law. There was a demurrer to the bill. At first the court was of the opinion that the demurrer was properly overruled because—citing Lehman v. Shock (1883) 69 Ala. 493—"the remedy by ejectment at law is not full and adequate. A court of law is incompetent to sweep away the deed which clouds complainant's title, so long as it remains in the hands of the defendants uncancelled." On rehearing, however, this opinion was reversed on the ground that the claimant could not properly be deprived of his right to trial by jury and that the bill should be dismissed until the plaintiff had successfully defended the action at law. It would seem that a judgment in the plaintiff's favor in the action of ejectment against him would ordinarily be adequate because it is an adjudication that the deed was invalid and would usually convince purchasers; and since there was nothing to show that the claimant was likely to dismiss the action, the final decision seems correct; see 6 Col. Law Rev. 55.

1. See *ante* §409.

2. See *ante* § 416. In Duke of Dorset v. Girdler (1720) Precedents in Chancery 531, 2 Ames Eq. Cas. 166, the plaintiff alleged that he had a sole right of fishery, that the defendant pretended a sole right of fishery in himself and threatened to disturb the plaintiff after all the plaintiff's witnesses should be dead; the demurrer to the bill for the perpetuation of testimony was overruled. At that date a bill to remove cloud on title was still unknown—see *ante* § 413; but since the plaintiff probably did not wish to sell his sole right of fishery, the remedy given may have been adequate.

order to sustain his bill the plaintiff must allege[3] therein the existence of a legal right[4] which he fears may be injured in some way in some future litigation by loss of proof; and also that he is not in a position to sue immediately at law.[5]

§ 421. Taking testimony de bene esse.

After action has begun[1] either party may secure the examination of aged or infirm witnesses or of a single witness who may die before the trial.[2] If the litigation is in a court of law the plaintiff must proceed by bill; but if in an equity court he may proceed by motion.

The matters in this and the preceding section are now regulated almost everywhere by statute.

§ 422. Bills to secure rights of future enjoyment.

Where one has possession of chattels with only a limited interest therein, the one having the interest in remainder, either vested or contingent, could formerly

3. The proceeding seems to be substantially *ex parte* because the allegations are taken to be the whole truth, the defendant having no opportunity to contest it; Langdell Summary Eq. P'd'g. (2nd Ed.) 237.

4. Because he failed to allege a legal right the plaintiff failed in Sackville v. Ayleworth (1682) 1 Vern. 105, 2 Ames Eq. Cas. 165. In that case one A had made a will devising to the plaintiff and then became lunatic; the plaintiff brought his bill against the presumptive heir but since the will was ambulatory till the testator's death, the plaintiff had no right or title till that time.

5. In Parry v. Rogers (1686) 1 Vern. 441, 2 Ames Eq. Cas. 165 the plaintiff failed because he could at once try his right at law. *A fortiori*, he will fail if the suit has already been begun; in such a case he is entitled only to take testimony *de bene esse;* Earl Spencer v. Peek (1867) 3 Eq. 415; 2 Ames Eq. Cas. 170.

1. It is not sufficient that an action is about to be begun; Angell v. Angell (1822) 1 Simons & Stuart 83, 2 Ames Eq. Cas. 168.

2. In a bill to perpetuate testimony, all the testimony may be taken; Earl Spencer v. Peek, *supra*.

in all cases require that the holder of the particular interest give him security for the forthcoming of such chattels at the end of such interest.[1] But for nearly two centuries security has been required to be given[2] only where some real danger of loss[3] is shown; in other cases the holder of the particular interest is merely required to sign an inventory to be deposited with an officer of court.[4]

Likewise a legatee who is either certainly or contingently entitled to the payment of a legacy in the future may compel the executor either to give security or to appropriate money therefor.[5] And where property has been contracted to be devised by A to X and then conveyed by A to Y who is not a *bona fide* purchaser for value, X is entitled to a decree that Y shall hold the property subject to X's contract during the life of A and then convey to X.[6]

1. (1695) Note, Freeman Chancery 206, 2 Ames Eq. Cas. 173.

2. Lyde v. Taylor (1850) 17 Ala. 270, 2 Ames Eq. Cas. 174 (slaves claimed absolutely by the life tenant).

3. The chief dangers are that the chattels may be wasted, secreted or removed; if the tenant is pecuniarily irresponsible, the danger is often very great; Langworthy v. Chadwick (1838) 13 Conn. 42.

4. Bill v. Kinaston (1740) 2 Atk. 82, 2 Ames Eq. Cas. 173.

5. Especially if the executor is insolvent; Rous v. Noble (1691) 2 Vern. 248; or has threatened not to pay, Batten v. Earnley (1723) 2 P. Wms. 163; tho no such fact is essential; Johnson v. Mills (1749) 1 Ves. Sr. 232. In Nutter v. Vickery (1874) 64 Me. 490, security was required from legatees who held property subject to an annuity. And in Flight v. Cook (1755) 2 Ves. Sr. 619 security was required of a defendant who had contracted to place £200 in such a situation as to be forthcoming at his death if the plaintiff should be then alive, danger of loss having been shown.

6. Van Dyne v. Vreeland (1858) 12 N. J. Eq. 142. At page 157 the court points out that such a bill is primarily a bill *quia timet*, the decree for specific performance being only incidental thereto. See *ante* § 89.

CHAPTER IX.

Bills of Interpleader.

§ 423. In general.

Whatever the literal meaning of the term interpleader,[1] it is commonly used to designate a proceeding devised to enable a person who is ready to perform a duty but is unable to determine[2] to whom such duty is owed, to compel[3] the adverse claimants[4] to such performance to litigate the matter between themselves and thus relieve him from the suits which have been or which might otherwise be brought against him. The earliest interpleader in Anglo-American legal history is in the early common law courts.[5] Later—perhaps because of the introduction and development of the jury system—common law interpleader became obsolete and the matter was taken over entirely into equity. It is at least partly due to this common law

1. "Literally the term means, to discuss or try a point incidentally happening as it were between, before the principal cause can be determined." Maclennan, Interpleader, 1, citing Jacobs Dict. (1732).

2. Broadly speaking, interpleader is a *quia timet* remedy, the applicant fearing that he will be doubly vexed and perhaps doubly charged for one liability.

3. The verb "interplead" is used both transitively and intransitively: it is sometimes said that the applicant is allowed to interplead the claimants and sometimes that he is allowed to compel them to interplead.

4. Since the one who asks for interpleader is substantially a defendant, and the persons against whom he asks interpleader are in substance plaintiffs it is clearer to use the terms applicant and claimants rather than plaintiff and defendants.

5. Maclennan, Interpleader 5. It seems to have been allowed only in real actions and in detinue.

origin that the subject has not received the liberal treatment it deserves. As will be pointed out in the following sections, many of the essentials which are still required in many jurisdictions[6] savor of the narrowness of common law technical rules rather than of the broad remedial spirit of equity.

§ 424. Applicant must show a reasonable doubt.

It is well settled that the applicant must establish not only that adverse claims have been made but that such claims have a reasonable foundation,[1] and that there is a reasonable doubt as to whether the applicant would be safe in satisfying either claim;[2] hence if one claim is a mere pretext,[3] interpleader will be refused. The applicant will likewise fail if he shows that one claimant is without doubt entitled.[3] But if at the time the bill of interpleader was filed there was a reasonable doubt, it is of no importance that one of the claims is later adjudged invalid.[4]

If the applicant has a personal defense against one of two claimants it may be argued that in such a case he does not need interpleader, because there is no serious danger of double vexation: but a recent

6. The present English law of interpleader has been made satisfactory by statutes passed in 1831, 1860, 1873, and 1883. There has been some legislation in this country but probably no state has gone as far as England in abolishing artificial requirements; Maclennan, Interpleader 13-20.

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1. Post v. Emmett (1889) 40 N. Y. App. Div. 477.

2. In Baltimore & Ohio R. R. v. Arthur (1882) 90 N. Y. 234, 2 Ames Eq. Cas. 13, one of the alleged claimants had written to the applicant: "although I am not prepared to say you should pay me, but I caution you against paying any one but me, for upon the adjustment of the transactions. . . . I may be found entitled to receive payment, in which event I shall require it made to me."

3. Crass v. Memphis etc. R. R. Co. (1892) 96 Ala. 447, 11 So. 480: "When, from the complainant's own showing, there can be no doubt in the case, the party entitled to the debt or duty claimed is not to be subjected to the delay and expense of a chancery suit."

4 Crane v. McDonald (1890) 118 N. Y. 648, 23 N. E. 991.

case[5] took the more liberal view that if the applicant wished to waive the defense the other claimant could not validly object in any way and hence interpleader was given.

§ 425. Must one claimant be entitled?

If the applicant is in a position where he may safely defy all claimants—as in the case of an illegal transaction—the applicant stands in no need of interpleader and relief is properly refused.[1] But if the applicant is or may be under a legal obligation to some one—as in the case of the offer of a reward—the fact that none of the adverse claimants may prove to be entitled should be no bar to relief.[2] If none of the claimants succeeds, the *res* should be returned to the applicant.

§ 426. No collusion with either claimant.

In order to obtain relief it must appear that the applicant has not colluded or allied himself with either claimant.[1] Thus, if he has contracted with one claimant to do what he can to defeat the claim of the

5. Grell v. Globe etc. Co. (1900) 55 N. Y. App. Div. 612; the applicant insurance company had a complete defense against one claimant because he brought his action more than a year after the loss; 14 Harv. Law Rev. 622.

1. Applegarth v. Colley (1842) 2 Dowling N. S. 223, 2 Ames Eq. Cas. 3; stakeholder in an illegal wager.

2. Fargo v. Arthur (1872) 43 How. Pr. 193. But in Collis v. Lee (1835) 1 Hodges 204, 2 Ames Eq. Cas. 3, relief was refused.

1. And the applicant must file an affidavit to this effect or his bill will be demurrable; Wing v. Spaulding (1891) 64 Vt. 83, 23 Atl. 615. But it is not necessary for him to make an affidavit that the bill is filed at his own expense; Metcalf v. Hervey (1749) 1 Ves. 248. Furthermore, the court will not admit an affidavit to the contrary; Stevenson v. Anderson (1814) 2 Ves. & Beames 407, 2 Ames Eq. Cas. 43.

other claimant, interpleader will be denied.[2] And the result is the same if he has given up all or part of the goods to one of the claimants.[3]

§ 427. Applicant's interest in the res.

If the applicant himself claims to be entitled to all the *res*, he may perhaps be entitled to a bill of peace[1] but not to a bill of interpleader.[2] On the other hand if he claims merely a limited interest in the *res*—such as a lien—and his claim is admitted by all the claimants, this should be no bar to equitable relief. Even if one or both parties refuse to admit his claim, there would seem to be no substantial objection to allowing the applicant to bring the *res* into court and later litigating his claim with the winner,[3] but the prevailing rule is not so liberal.[4] Where the applicant is willing to waive his lien even after he has judicially asserted it, it ceases to be a bar to interpleader.[5]

If the claimants claim different amounts it is arguable that the applicant is interested because it will be financially beneficial to him if the one who claims the lesser sum should win, and this argument

2. Murietta v. South American etc. Co. (1893) 62 L. J. Q. B. [N. S.] 396.

3. Braine v. Hunt (1834) 2 Dowl. 391. Relief was also denied in Burnett v. Anderson (1816) 1 Merivale 405 tho the goods were perishable and the claimant to whom the goods were thus delivered had undertaken to pay the value of the goods into court, the Chancellor arguing that the true claimant was entitled to have his goods specifically. The result seems unfortunate and the point should be taken care of by legislation, if necessary.

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1. See *post* § 439.

2. Or if he denies any liability whatever to either claimant.

3. This seems to be the English rule under the Interpleader Act; Cotter v. Bank (1834) 2 Dowl. 728.

4. Mitchell v. Hayne (1824) 2 Simons & Stuart 63, 2 Ames Eq. Cas. 12 (applicant claimed commission as auctioneer against one claimant but not against the other).

5. Jacobson v. Blackhurst (1802) 2 Johns & H. 486.

has sometimes been used against him.[6] But the liberal and better view is that he should not be barred by this if he is willing to bring into court the larger amount claimed.[7] Many of the cases of this sort are cases where the applicant has been assessed for personal taxes in two counties or cities each claiming him as a resident. The denial of relief in these cases may very well go upon the public interest in the prompt collection of public revenue;[8] but some cases have allowed relief, apparently considering that such public interest is not sufficiently involved.[9]

§ 428. Other relief inadequate.

An applicant is not entitled to interpleader if there is other adequate relief. Thus if he may settle the matter by an action of ejectment[1] or by merely moving off the land of which he is in possession as a

6. Murietta v. South American, etc. Co. (1893) 62 L. J. Q. B. [N. S.] 396: "But he does possess this very substantial interest in it that if one party succeed he will have to pay . . . $100,000; whilst if the other party succeed, he will have to pay very much less, perhaps . . . $80,000. Therefore, to the extent of the difference between these sums, he is very much interested in the subject matter, because in the event of one party succeeding he is entitled to a large amount which he may keep for himself."

7. If the claimant who claims the less sum wins, the excess should, of course, be returned to the applicant, tho it is suggested in 11 Col. Law Rev. 580, 581 that this can not properly be done because the applicant has renounced all interest in the fund.

8. Macy v. Inhabitants of Nantucket (1876) 121 Mass. 351; Welch v. City of Boston (1911) 208 Mass. 326, 94 N. E. 271, 35 L. R. A. [N. S.] 330; the question is fully discussed in 25 Harv. Law Rev. 174 and 11 Col. Law Rev. 580.

9. Thomson v. Ebbets (1824) Hopkins Ch. 272, 2 Ames Eq. Cas. 16; Dorn v. Fox (1874) 61 N. Y. 264.

1. In Killian v. Ebbinghaus (1884) 110 U. S. 568, 2 Ames Eq. Cas. 47, E brought a bill averring that he was trustee of certain land; that two sets of defendants whom we will call X and Y each claim to be the beneficiaries of the trust, and that X had already received the rents and profits of the property. The bill prays an accounting of the rents and profits and for an injunction against X and Y bringing

squatter,[2] he does not need equitable relief. In Fitts v. Shaw[3] the property involved was two trunks and their contents which formerly belonged to the applicant's testatrix; both trunks were claimed by the residuary legatee, the other two claimants each claiming one trunk as a gift from the testatrix. Interpleader was denied because "a suit at law by one of the donees against the executor would conclude not only the executor but the residuary legatee as well, and no suit for these specific chattels would lie in favor of the residuary legatee against the executor."[4] A suit for an accounting will lie, however, and he may not be willing to postpone his suit till after the donee's action is decided; hence there may be double vexation and interpleader might well have been allowed.[5]

The fact that one claimant had sued the applicant in equity and could have joined the other claimant[6] but did not do so is no bar to interpleader;[7] nor is the fact that a plaintiff in another proceeding may

suit against E. X filed an answer denying that E was trustee; Y's answer admitted all the averments of the bill. In denying relief: "But the complainant is out of possession; he has no rents in his custody. He is therefore in no jeopardy from the conflicting claims of the defendants and cannot call on them to interplead. Instead of admitting title in the two sets of claimants, and asking the court to decide between the two, he sets up title in himself for the benefit of one set and seeks relief against the other . . . The fatal objection to the suit is that it is in fact an attempt by the party claiming the legal title to use a bill in equity in the nature of a bill of interpleader as an action of ejectment."

2. Metcalf v. Hervey (1749) 1 Ves. 248.

3. (1900) 22 R. I. 17, 46 Atl. 42, 2 Ames Eq. Cas. 7.

4. Double recovery is not possible because the executor would be protected as against the residuary legatee by showing that the property had been taken away from him by the judgment.

5. The court suggested that if the questions of fact had been less complicated they would have treated the bill as one by a trustee for instructions and given interpleader relief on that ground. See *post* § 436, on bills in the nature of a bill of interpleader.

6. And thus settle the whole matter; see *ante* § 24.

7. Prudential Assurance Co. v. Thomas (1887) 3 Ch. App. 74.

make a motion that the applicant pay the money into court.[8]

§ 429. Part of the claimants non-resident.

If interpleader is awarded to the applicant the court at once enjoins all other proceedings which have been or are likely to be brought against the applicant by any of the claimants[1] either at law or in equity.[2] And if the claimants have all been personally served with process or have voluntarily submitted themselves to the jurisdiction of the court, this decree would include any future proceeding in any jurisdiction.[3]

Since without an enabling statute equity courts ordinarily refuse to act except upon personal jurisdiction,[4] one would expect to find them refusing interpleader where part of the claimants are non-residents who have not been served with process or appeared voluntarily. But English courts very early found a way of giving partial[5] relief. In Stevenson v. Anderson:[6] "It was objected that the Goodalls and the at-

8. Warrington v. Wheatstone (1821) Jacob 202.

1. Warrington v. Wheatstone (1821) Jacob 202.

2. Prudential Assurance Co. v. Thomas (1867) 3 Ch. App. 74.

3. The decree awarding interpleader to the applicant should be a good defense to him everywhere.

4. See *ante* § 9.

5. The decree would not protect the applicant from a suit in a foreign jurisdiction; Cross v. Armstrong (1886) 44 O. St. 613, 10 N. E. 160.

6. (1814) 2 Vesey & Beames 407, 2 Ames Eq. Cas. 43. In that case the applicant's bill stated that Anderson had ordered goods from Goodalls his correspondents in Scotland and to indemnify them sent them bills of exchange indorsed by himself. One Dick, of Scotland, a creditor of Anderson, garnisheed the Goodalls in a Scotch court. The applicant held the bills in England for collection and filed this bill of interpleader against Anderson, Dick and the Goodalls, alleging that Anderson had demanded the return of the bills from the Goodalls and from the plaintiff and had sued the applicant in trover.

taching creditor are out of the jurisdiction; and as there is only one creditor within the jurisdiction, a bill of interpleader cannot be filed. Upon the authorities that proposition cannot be maintained; as a person out of the jurisdiction may threaten and bring an action; and tho he should never come within the jurisdiction, there is a familiar mode of concluding him. . . . The plaintiff in a bill of interpleader against persons within and without the jurisdiction is bound to bring them all within the jurisdiction[7] in a reasonable time; if he does not, the consequence is that the only person within the jurisdiction must have that which is represented to be the subject of competition; and the plaintiff must be indemnified against those who are out of the jurisdiction when they think proper to come within it and sue at law or in this court. If the plaintiff can show that he has used diligence to bring persons out of the jurisdiction to contend with those that are within it, and they will not come, the court upon that default, and their so abstaining from giving him the opportunity of relieving himself, would, if they afterward came here and brought an action, order service on their attorneys to be good service, and enjoin that action forever.''[8]

7. This seems now to be superseded by a service of a statutory notice of the proceeding; Credits Gerendeuse v. Van Weede (1884) 12 Q. B. Div. 171.

8. In this country it is difficult to state what the prevailing rule is. In Freeland v. Wilson (1853) 18 Mo. 380 the court did not seem to grasp the difficulties: "If a fund is in the hands of an agent of our law (administrator) which is claimed by two non-residents, and one of them makes a demand in this state on the agent, under circumstances otherwise appropriate, we see no objection to a bill of interpleader, or a proceeding of that nature by the agent, for the purpose of compelling the claimants to litigate their rights. In such a proceeding, upon a decree against a non-resident, on notice by publication only, or by service beyond the limits of the state, he would, under the statute regulating the proceedings in chancery, have an opportunity of contesting the validity on the merits."

In order that full and complete relief be given against a nonresident claimant, courts must have and exercise jurisdiction *in rem*. A decree given in such a proceeding would protect the applicant everywhere.[9]

§ 430. Claims mutually exclusive—independent liability.

Generally speaking, interpleader will be denied unless the claims mutually exclude each other. If the applicant is under an admitted liability to one of the claimants which is in no way dependent upon his liability or non-liability to the other, interpleader will not reduce the amount of litigation. He should satisfy the admitted liability to one of the claimants and litigate with the other claimant.[1] Even where the

If the foreign claimant has already begun his action in a foreign court, relief is usually refused in this country; see Orient Ins. Co. v. Sloan (1888) 70 Wis. 611, 36 N. W. 388. And if action has been begun in a federal court a state court will not award interpleader; 22 Harv. Law Rev. 294, 306.

9. With rare exceptions such jurisdiction exists only by virtue of a statute; in order that the decree be recognized as valid everywhere, the statute must provide for due publicity so that the nonresident claimant will have a reasonable opportunity to come in and litigate. The requirement in Stevenson v. Anderson *supra*. that the applicant use diligence to get in the non-residents is somewhat similar.

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1. Bassett v. Leslie (1890) 123 N. Y. 396, 25 N. E. 386: "undoubtedly the plaintiffs are exposed to the hazard of paying the sum claimed of them twice. But that hazard does not spring out of their liability to pay Alcock & Co., but out of the question whether Miss Leslie is a *bona fide* holder of the draft for value; and whether she is or not is a matter solely between them and her." See also Lindsey v. Barron (1848) 6 Com. B. 291, 2 Ames Eq. Cas. 39; B the applicant's intestate was depository of plate belonging to M; he obtained money from L to be loaned to M on M's note and the plate, and gave a writing to that effect. M claims that B had no authority to pledge the plate. Since the applicant was apparently bound at all events to M on the contract of lending, it would seem that interpleader was properly denied.

independent liability to one of the claimants is not admitted but where it is possible that the applicant may be thus legally liable to both, interpleader has—in the absence of statute—usually been refused. In Crawshay v. Thornton[2] the applicants were wharfingers; Raikes and Co. had deposited iron with them; Raikes and Co. then pledged the iron to Thornton and notified the applicants of the pledge and the latter thereupon acknowledged that they held for Thornton. Then Daniloff notified the applicants that he claimed the iron and that Raikes and Co. had no power to pledge. In denying interpleader: "Mr. Thornton may, from the acts of the plaintiffs themselves, have a right against the plaintiffs, independently of the question whether Mr. Daniloff be or be not entitled to the iron. This is a right which cannot be the subject of litigation between the defendants, and what ground can there be of depriving Mr. Thornton of that right by injunction?"

This argument still prevails in the United States:[3] but in England the rule has been so relaxed by

2. (1837) 2 Mylne & Craig 1, 2 Ames Eq. Cas. 18.

3. In National Life Ins. Co. v. Pingrey (1886) 141 Mass. 411, 6 N. E. 93, 2 Ames Eq. Cas. 37, a policy on the life of the insured payable to his mother had been surrendered and a new one payable to the wife of the insured was taken out without the consent of the mother. In refusing interpleader to the insurance company: "The questions arising between the plaintiff and the different defendants cannot all be tried in an issue between the two defendants alone. . . . By issuing these two policies, the plaintiff has exposed itself to both of these claims, and must meet them as best it may. The difficulty of maintaining the bill of interpleader is not technical, but fundamental. In this form of proceeding, we cannot inquire whether the plaintiff has incurred a double liability. That result is possible. The plaintiff ought to be in a position to be heard upon the question; but on a bill of interpleader which assumes that the plaintiff is merely a stockholder, the plaintiff cannot be heard. The plaintff cannot have an order that the defendants interplead when one important question to be tried is, whether, by his own act, he is under liability to each of them."

statute[4] that even the admitted existence of an independent liability is no longer an absolute bar to relief. If the court thinks that under the circumstances the burden of the litigation should be borne by the claimants rather than the applicant, and if furthermore the whole matter may be settled by the success of the claimant who also claims the independent liability, interpleader may be awarded. In *In re* Mersey Docks and Harbor Board[5] one Nicholls had stored tobacco with the applicants, wharfingers, and then pledged it to the Union Credit Bank; by some manipulation Nicholls again got control of it and pledged it to the North and South Wales Bank. Both banks claim the tobacco and the North and South Wales Bank also claims that the applicants were estopped by a letter to it. The trial court granted interpleader and the appeal court held that even tho there was estoppel it was a proper exercise of the court's discretion: "It is argued that to grant such relief under the circumstances is not just. I do not think that is so. There is a dispute between these two banks as to the property in these goods, and a substantial and difficult question has to be fought which depends on what the action of Nicholls in the matter has been. Who *prima facie* ought to fight that question? Ought the Mersey Docks and Harbor Board, who hold merely as wharfingers, and who really have no interest in the matter, to fight that question, or ought it not rather to be fought out between the two banks who are respectively asserting a title to the goods? There is this further reason. . . If on the trial of the issue directed the North and South Wales Bank prove their title to the goods, then there is an end of the matter. If on the other hand, the Union Credit Bank succeed in establishing their title to the goods, then will arise the question whether, as the North and

4. See Rules of Court (1883), order LVII. Apparently no American legislation has taken this step.

5. (1899) 1 Q. B. D. 546, 2 Ames Eq. Cas. 40.

South Wales Bank contend, although the goods are in truth not theirs, but the property of the Union Credit Bank, nevertheless they have a claim against the Mersey Docks and Harbor Board by reason of an estoppel arising from the letter of October 12. I think they ought not to be shut out by the order from asserting any claim they may have on that letter, and therefore we propose to enlarge the terms of the order so as to leave it open to them to do so, if they are defeated on the issue." Since giving interpleader in such cases may thus result in a double litigation for the one claiming the independent liability, the relief should be given with caution.

§ 431. The same debt, duty or thing.

It is quite obvious that interpleader would accomplish nothing and therefore be inappropriate, if the things demanded are entirely different and unrelated; if, for example, one claimed a car load of coal and the other a yoke of oxen, through an entirely unrelated transaction. If interpleader were asked in such a case it would properly be denied upon the simple ground that the claims do not mutually exclude each other;[1] the applicant may be liable to both claimants.

It is true, therefore, that the claimants must claim the same debt, duty or thing, but the requirement should have a liberal interpretation and be considered satisfied if the claims are mutually exclusive; the mere fact that the claimants must bring different actions or claim in different capacities ought to be held immaterial if their claims are substantially the same. A narrow interpretation of the requirement is responsible for some inequitable results and much confusion of thought. In Slaney v. Sidney[2] the applicant had agreed to buy tea from Y, the warrants therefor having been made

1. See *ante* § 430.
2. (1845) 14 M. & W. 800, 2 Ames Eq. Cas. 11.

out in Y's name. Before time of payment arrived X notified the applicant that the tea warrants had been obtained wrongfully from X and asked the applicant not to pay the price to Y. X brought an action of trover for the value of the tea and Y brought an action of debt for the purchase price. In denying relief: "The parties cannot interplead here for they do not claim the same thing; the one seeks to have the benefit of a contract, the other claims the value of the chattel which is the subject matter of it. The plaintiff in this action [Y] claims the price agreed to be paid for the tea, which may be ten times its real value; while the plaintiffs in the other action [X] only claim its real value, in the shape of damages for its conversion."[3] As already explained,[4] the difficulty as to the difference in the amounts claimed can be met by requiring the applicant to pay in the larger amount. The claims were mutually exclusive;[5] the fact that different forms of action were brought against the applicant should have been considered an immaterial matter of procedure, the claims being in substance the same.

An illustration of the broader and more liberal interpretation is seen in those cases which have given relief to an applicant who has been assessed for personal taxes in different cities or counties each claiming him

3. In Johnson v. Atkinson (1797) 3 Anstruther 798, 2 Ames Eq. Cas. 10, one S had devised coal mines to trustees for S's relatives; the trustees leased the premises to the applicants. A and his wife received for a time their proportionate share under the will but later commenced an action for use and occupation of the premises claiming that the devise and lease were void. In denying interpleader against the trustees and A and wife the court gave as one of its reasons that the things demanded were different. While it is true that the trustees claimed the rent reserved and A and wife claimed in a different form of action the unliquidated value of the use and occupation, in substance the claims were the same and mutually exclusive.

4. See *ante* § 427.

5. There is nothing to show that any contention was made that the applicant might be legally liable to pay both.

as a resident.[6] In a narrow sense it is not the same tax;[7] but since the applicant has only one legal residence the claims are mutually exclusive.

§ 432. Privity between claimants—land.

It is frequently stated as a requirement for interpleader that there be privity between the adverse claimants which means either that one claim shall be derived from the other or that both claims shall be derived from a common source.[1] This supposed requirement can be traced back as far as the case of Dungey v. Angove.[2] In that case one D was in the possession of premises belonging to A under a twenty-one year lease; he paid rent for eight or nine years till notice of ejectment was served on him under a title of H, adverse and paramount to that of A. The ejectment action was not pressed but D refused to pay any more rent and filed a bill of interpleader. Relief was properly denied because it appeared that the ejectment action was a sham and that there was really no danger of double vexation,[3] but the court also rested their decision on the ground that it would be an "alarming consequence for a tenant in possession whose duty it is to stand by and defend the possession for the landlord to become the instrument to betray him" and that it would be "a monstrous thing if it was in the power of the tenant to make the landlord, at law the defendant in the ejectment, disclose his title by an interpleading bill."[4]

The rule above referred to of precluding the tenant

6. See *ante* § 427, note 9.
7. See 11 Col. Law Rev. 500.

1. Maclennan, Interpleader 122.
2. (1794) 2 Ves. Jr. 303.
3. See *ante* § 424.
4. The court also said it would be "as pernicious a practice, and as dangerous to the landed property of the kingdom as ever came before the court."

from denying the title of his landlord[5] has been criticised;[6] but even assuming its validity and soundness at common law, it would seem that equity might very easily have overcome the objection as to forcing the landlord to show his title, by the simple expedient[7] of imposing the burden of proof as to title upon the claimant making the paramount claim.[8] If the claim of the other claimant arises subsequent to the lease, he is in privity with the landlord and unless the tenant is barred by some other unfulfilled requirement he is clearly entitled to interpleader.[9]

§ 433. Same —property other than land.

According to the early law, a bailee of a chattel

5. This is usually stated in terms of estoppel; 9 Col. Law Rev. 252, 253; but Tiffany, Landlord and Tenant, 441, has shown that while this term is appropriately used where ejectment is brought by the landlord, it is not applicable in connection with a claim for rent; but that the true reason for the preclusion in the latter case is "merely that the law does not recognize a lack of title in the lessor, not resulting in any interference with possession under the lease, as a ground for the repudiation of the contract," Tiffany thus places the denial of interpleader in land cases not on the ground of lack of privity as such but because the landlord and the adverse claimant do not claim the same thing and because the landlord has a claim for rent independent of the state of the title. Tiffany, Landlord and Tenant 1828. See also Maclennan, Interpleader 24. These grounds for denying interpleader have already been considered. See *ante* § 430 and § 431.

6. Tiffany, Landlord and Tenant 475.

7. Tiffany suggests that common law courts might deal similarly with the question by requiring that the tenant who disputes his landlord's title to assume the burden of proof. Tiffany, Landlord and Tenant 476.

8. In Indiana, a statute allows a tenant to interplead his landlord and a paramount claimant; Hall v. Craig (1890) 125 Ind. 523; 25 N. E. 538; R. S. § 274.

9. Cowtan v. Williams (1803) 9 Ves. 107, 2 Ames Eq. Cas. 8. See also Jew v. Wood (1841) Craig & Phillips 185: "after the death of the person to whom the occupier became the tenant, the tenant may require the person claiming under the original lessor to prove his title under such original lessor."

was precluded from denying his bailor's title[1] and hence at that time stood in substantially the same position with regard to interpleader as a tenant toward his landlord; the discussion in the previous section would therefore apply.[2] At the present time, however, there seems to be no such rule of preclusion,[3] and hence unless the bailee has specifically entered into an independent liability toward his bailor,[4] the fact that the third person claims a paramount title should not prevent interpleader. In spite of this, however, there is still much talk of privity in bailment cases and the lack thereof is frequently relied upon in denying equitable relief. In First National Bank v. Binninger,[5] one B deposited bonds with the applicant by way of indemnity; C claimed the bonds by virtue of a judgment against B and a seizure and sale of the bonds under it. Mrs. B claimed that the bonds were hers and that B had no interest in them. The chief argument[6] in denying relief was that there was no privity between the two claimants.

If the applicant is neither tenant nor bailee there is not even a historical justification for the privity doctrine, but even in such cases the requirement is

1. See 17 Harv. Law Rev. 489.

2. See *ante* § 432. Similarly the objection as to compelling the bailor to prove his title could be met by giving the paramount claimant the laboring oar; and the whole doctrine when analyzed reduces itself to this: that the bailor had a claim against the bailee independent of the question of title. As already explained—*ante* § 430—this need not be an absolute bar and is not now in England.

3. Crawshay v. Thornton (1837) 2 Mylne & Craig 1; 2 Ames Eq. Cas. 18: "In the case of simple bailment there is no personal undertaking, and no liability or right of action beyond that which arises from the legal consequences of the bailment."

4. In Crawshay v. Thornton *supra*, this was the reason for denying interpleader; see *ante* § 430.

5. (1875) 26 N. J. Eq. 345, 2 Ames Eq. Cas. 24.

6. The court also speaks of the applicant as being "a wrongful possessor, if he should, after notice withhold the property from the rightful owner." But in every case where interpleader is given, the applicant is a technical tort feasor to the rightful owner.

frequently insisted upon. In Third National Bank v. Skillings Lumber Co.,[7] B had delivered a draft to applicant bank for collection; the draft had been collected and the amount placed to the credit of B. The S. Co. contended that the draft was its property because B was acting merely as its agent; B's executrix claimed that the proceeds belonged to B's estate. Interpleader was denied because the S Co. did not claim the fund in the hands of the applicant through any privity[8] with B, but by a title paramount and adverse to his. On the other hand, there are many cases where the requirement of privity has been ignored or explained away.[9]

It has been suggested[10] that where the applicant is a debtor—the property thus consisting of a chose in action—there is always privity because "the claimants must necessarily claim through the obligation itself, which ensures privity." Perhaps any escape from the requirement should be welcomed,[11] but the only satisfactory way of dealing with the matter is by legislation. The English statute[12] provides that inter-

7. (1882) 132 Mass. 410, 2 Ames Eq. Cas. 27.

8. It might be suggested that there really was privity here because B had title to the draft and hence the S. Co. is claiming through B as trustee.

9. In Platte Valley Bank v. National Live Stock Bank (1895) 155 Ill. 250, 40 N. E. 621, 2 Ames Eq. Cas. 29, one Halsey sold coffee that had been mortgaged to the Union Stock Yards National Bank and deposited the money in the applicant bank; Halsey then assigned his claim to the Platte Valley Bank for value. Both the Union Stock Yards Bank and the Platte Valley Bank claim the deposit. Interpleader was allowed tho the only basis for contending that the Union Stock Yards Bank claimed through Halsey and his assignee would be by recognizing the doctrine of constructive trust as applying to the proceeds of the sale. The court found privity in that both claimants claimed through the deposit made by Halsey.

10. Platte Valley Bank v. National Live Stock Bank *supra;* 17 Harv. Law Rev. 489.

11. That privity was not an essential in the old common law interpleader is shown by the fact that the finder of a lost chattel could interplead several claimants.

12. Common Law Procedure Act of 1860, 23 & 24 Vic. c. 126, § 12.

pleader should lie tho the titles of the claimants to the money, goods, or chattels in question, or the proceeds or value thereof, had not a common origin, but were adverse to and independent of one another. In a few states in this country there is similar legislation.[13]

§ 434. Applicant a tort feasor.

The old English doctrine in regard to sheriffs was that if a sheriff levied upon property which was later claimed by a stranger, interpleader should be denied because the sheriff must admit that "as to some of the defendants he is a wrongdoer."[1] This was remedied in the English act of 1831[2] which made an express provision for sheriffs. In Child v. Mann[3] the statute apparently did not apply because the sheriff had been notified of the bankruptcy of the judgment debtor before he sold the goods; but the court nevertheless gave relief because it had ordered the sheriff to make the return and therefore felt obliged to protect him.

In this country some states have passed statutes;[4] in the absence of statutes, decisions are conflicting.[5]

When it is remembered that in every case of interpleader the applicant is a technical wrongdoer in withholding from the true claimant,[6] it would seem that a sheriff who acts in good faith in making the levy and sale should not be denied relief on that ground.

13. Maclennan, Interpleader 125 and appendix.

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1. Slingsby v. Boulton (1813) 1 Ves. & B. 334; 2 Ames Eq. Cas. 33.

2. 1 and 2 Wm. IV., ch. 58, § 6.

3. (1867) 3 Eq. 806, 2 Ames Eq. Cas. 35.

4. Maclennan, Interpleader 42.

5. See Quinn v. Patton (1841) 2 Ired. Eq. 48 refusing relief; and Lawson v. Jordan (1858) 19 Ark. 297, giving relief.

6. See First National Bank v. Binninger (1875) 26 N. J. Eq. 345, 2 Ames Eq. Cas. 24, where the same argument was made against a bailee's getting interpleader; and see 15 Harv. Law Rev. 61, 63.

§ 435. Judgment or verdict against applicants—laches.

It is sometimes laid down as a hard and fast rule that if either or both claimants have obtained a judgment or verdict against the applicant, interpleader will be denied. This is sometimes put on the ground that it would amount to an indirect appeal[1] but courts of equity do not in other fields feel themselves bound by a judgment,[2] much less by a verdict. It has also been suggested that it is because the claimants are no longer claiming the same debt or duty;[3] and that it is because the claims are not mutually exclusive[4] but it is difficult to see how the reducing of a claim to judgment could change the substance of the situation. The better view seems to be that there should be no absolute rule on the point, but that allowing a claimant to get a judgment or verdict is merely evidence of laches, more or less conclusive,[5] according to other circumstances. Even tho no judgment or verdict be obtained, the right to interplead may be lost by unreasonable delay.[6]

§ 436. Miscellaneous—bills in the nature of a bill of interpleader.

Where interpleader is granted there are really two stages in the suit, the applicant dropping out entirely from the second stage,[1] in which each claimant contests

1. Victoria Ins. Co. v. Bethune (1877) 1 Ont. App. 398, 407; Yarborough v. Thompson (1844) 11 Miss. 291; or a bill for a new trial, Larabrie v. Brown (1857) 26 L. J. Eq. N. S. 605.

2. See *ante* § 14.

3. Maclennan, Interpleader 84. For a discussion of the merits of this objection see *ante* § 431.

4. See 22 Harv. Law Rev. 294.

5. Lozier's Ex's v. Van Saun's Admr's (1835) 3 N. J. Eq. 325; 18 Harv. Law Rev. 315.

6. U. S. v. Bussey (1889) 27 N. Y. St. Rep. 185; 7 N. Y. Supp. 495; Maclennan, Interpleader 47.

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1. Except that under the present English practice where interpleader is given in spite of one of the claimants claiming an inde-

for the *res*. Hence the applicant is not allowed to appeal in behalf of the losing claimant[2] and if the applicant dies after interpleader has been granted, no revivor is necessary.[3]

It is a hard and fast rule that a claimant cannot interplead[4] or compel the stakeholder to do so.[5] That this limitation is not a necessary one is shown by its absence in Scotland[6] and other countries having the civil law. Thus far, however, there is no legislation in common law countries attempting to widen the scope of interpleader at this point.

Before an injunction will issue against any present or future actions against the applicant, he must bring the subject matter of the interpleader suit within the control of the court; if it is money, it may be paid to the clerk of the court; if it is land, he should have the deeds executed and ready to deliver to the successful claimant; but if no objection is taken by demurrer the court will take care of the matter by its decree.[7]

If the applicant is unable to satisfy the requirements for a strict bill of interpleader, he can still get interpleader relief if there is some other ground for getting the case into equity, such as cloud on title,[8] trust,[9] mortgage,[10] bill of peace,[11] etc. In such a pro-

pendent liability: if the other claimant succeeds, then the applicant must litigate the question of the independent liability; see *ante* § 430.

2. St. Louis Life Ins. Co. v. Alliance Ins. Co. (1876) 23 Minn. 7.

3. Anonymous (1685) 1 Vern. 351, 2 Ames Eq. Cas. 2.

4. Hathaway v. Fry (1867) 40 Mo. 540.

5. Harrison v. Foster (1836) 4 Dowl. 558.

6. Maclennan, Interpleader 37.

7. Farley v. Blood (1854) 30 N. H. 354, 2 Ames Eq. Cas. 4.

8. Dorn v. Fox (1874) 61 N. Y. 264.

9. A bill by a trustee or executor for instructions is a frequent basis for incidental interpleader relief; Sprague v. West (1879) 127 Mass. 471; Osbourne v. Taylor (1885) 12 Gratt. 117; and see 17 Harv. Law Rev. 573.

10. Koppinger v. O'Donnell (1883) 16 R. I. 417.

11. In Aleck v. Jackson (1892) 49 N. J. Eq. 507, 23 Atl. 760, 2 Ames Eq. Cas. 45, C had contracted with O to construct some brick

ceeding he need not be disinterested,[12] and need not deny collusion.[13] The fact that equity takes this liberal view in giving interpleader relief incidentally is in itself an argument against the mechanical and arbitrary limitations upon interpleader proper. Because of the liberal practice in England it is less necessary there to resort to a bill in the nature of interpleader than it is in the United States.[14]

buildings; O sought to interplead C and the materialmen, alleging that he owed C $3593 and that the materialmen's claims aggregated $4597. C filed an answer claiming that O owed him $4893. This dispute between C and O prevented the bill from being maintained as a strict bill of interpleader, but relief was given because O was being subjected to numerous law suits by the various materialmen; see 23 Harv. Law Rev. 405. In Supervisors v. Deyoe (1879) 77 N. Y. 219, 2 Ames Eq. Cas. 51, M, county treasurer, having authority to issue notes to the extent of $20,800 had issued notes to the extent of $138,631. Thirty-one holders of notes had sued the county and twenty others were about to do so. The county asked that it all be settled in one suit, not being able to detect which are the valid and which the invalid notes without litigation "It may not be a case of interpleader strictly, or which meets all the definitions of a bill of peace, nor a case which could be maintained solely as one for the cancellation of written instruments, but it combines to a greater or less extent elements of jurisdiction in each of these cases." The requirement lacking for a strict bill of interpleader, in the mind of the court, was probably privity between the claimants; see *ante* § 433.

12. Groves v. Sentell (1894) 153 U. S. 465, 486; Supervisors v. Deyoe, *supra*.

13. Koppinger v. O'Donnell (1889) 16 R. I. 417, 16 Atl. 714. But he must not act in a partisan manner; Hinckley v. Pfister (1892) 83 Wis. 64, 85, 53 N. W. 21.

14. Maclennan, Interpleader 338.

CHAPTER X.

Bills of Peace.

§ 437. Purpose and scope.

The purpose of a bill of interpleader is to prevent double vexation to one who admits liability to someone and also to prevent unnecessary litigation by settling in one suit the question as to who is the rightful claimant.[1] The purpose of a bill of peace is to prevent useless litigation by settling in one equity suit a question which would be common to many actions at law or in equity—either repeated actions between one plaintiff and one defendant or numerous actions between several plaintiffs and one defendant or between one plaintiff and several defendants. One who seeks interpleader is substantially in the position of a defendant at law asking relief against two or more plaintiffs;[2] a bill of peace may be sought either by plaintiff or defendant.[3] One who seeks interpleader must be a stakeholder;[4] and is ordinarily not interested in the litigation except to get his discharge from the court;[5] one who seeks a bill of peace is not a stakeholder and is always interested in the final outcome of the litigation either to fix liability on the other party or to escape it himself.

1. See *ante* Chap. IX.

2. See *ante* § 423.

3. Where it is sought by one who is substantially in the position of a defendant, the jurisdiction may properly be classified broadly as *quia timet*; see *ante* § 405. In case of a bill of peace to prevent repeated actions, the bill apparently may be brought only by the law defendant.

4. See *ante* § 427.

5. This is not always true; if the amounts claimed are different, he is, in a broad sense interested in having the claimant of the les-

Since it is highly desirable to eliminate useless litigation, bills of peace have deserved a liberal treatment at the hand of the courts; but unfortunately they have been hedged about by artificial and mechanical restrictions in much the same way as have bills of interpleader.[6]

For the sake of convenience, the cases of numerous actions between one and many will be discussed separately from the cases of repeated actions between one and one.

A. To Avoid or Prevent Numerous Actions Between One and Many.

§ 438. Joinder distinguished.

At the outset it is important to note that if two or more cases may be brought separately in equity, the question of their joinder may not involve any question of bill of peace, but merely a question of equity pleading. Thus, if each of several plaintiffs might separately maintain a suit to enjoin the continuance of a nuisance, all may join therein,[1] having a common interest in the subject matter of the bill. A multiplicity of

ser amount win; see *ante* § 431. And under the English practice, where interpleader is allowed in spite of the possibility of there being an independent liability, he is interested in having that claimant win who is also relying on the independent liability; see *ante* § 430.

6. See *ante* § 423.

1. Cadigan v. Brown (1876) 120 Mass. 493: "The bill shows that each of the plaintiffs owns a lot abutting on the passageway, by a separate and independent title. They derive their titles from different grantors. Undoubtedly in a suit at law for the nuisance, they could not properly join. But the rule in equity as to the joinder of parties is more elastic. Generally, when several persons have a common interest in the subject matter of the bill, and a right to ask for the same remedy against the defendant, they may properly be joined as plaintiffs." And see cases collected, 2 Ames Eq. Cas. 66, note.

suits is in this way avoided without involving any question relative to a bill of peace. A similar joinder may be made where each of several plaintiffs might sue for a breach of trust and accounting;[2] or for cancellation.[3]

On the other hand, where rules of equity pleading do not allow the joinder of equity suits—as in cases of suits for injunctions against several and independent tort feasors—it is necessary to invoke bill of peace jurisdiction in order to have the cases consolidated into one.[4]

§ 439. Claim of an exclusive property right.

Probably one reason for the conservatism of the courts toward bills of peace is that the facts of the early cases made strong claims for relief and the courts since then have been reluctant to go much beyond these early decisions, regarding them as determining not only the principles but also the limits of the remedy.

In How v. Tenants of Bromsgrove[1] there was a bill by the lord of the manor against his tenants,

2. In Smith v. Bank of New England (1897) 69 N. H. 254, 45 Atl. 1082, 2 Ames Eq. Cas. 79, some seventy-eight *cestuis que trust* sued the trustee for mismanagement of the trust and for an accounting. Since each plaintiff might have sued separately for a breach of trust, there was merely a question of joinder. The court suggested that each plaintiff might have sued the trustee at law for negligence; if that is true and the seventy-eight plaintiffs had brought separate actions at law, and the defendant had asked the equity court to settle all in one suit, that would have raised a question of a bill of peace. In speaking of the suit as a "bill in the nature of a bill of peace" perhaps the court meant that it had the same effect as a bill of peace would have in cutting down useless litigation.

3. N. Y., N. H. & H. R. R. v. Schuyler (1858) 17 N. Y. 592.

4. Thus, in Dilly v. Doig (1794) 2 Ves. Jr. 486, 2 Ames Eq. Cas. 58, and in Foxwell v. Webster (1863) 2 Drewry & Smale 250, 2 Ames Eq. Cas. 58, the rules of equity pleading did not permit joinder but conceivably the principles of bills of peace might have allowed consolidation.

1. (1681) 1 Vern. 22, 2 Ames Eq. Cas. 55.

claiming that he had a grant of free warren. Besides the question whether he had a free warren there was was also the question whether, if there was a free warren, there was sufficient common left to the tenants. Both these questions were triable at law, but the bill was sustained as a bill of peace. It is to be observed that the plaintiff claimed an exclusive property right of a very definite character against all the defendants; and also that the defendants all claimed the same property right and the interests of all were dependent upon proof of the same facts. No stronger case for a bill of peace could be put than this.[2]

Some fifty years later the jurisdiction was extended to cases where the defendants' claim was not in common but in severalty. In Mayor of York v. Pilkington[3] the plaintiff city claimed for a large tract of land the sole fishery in the river Ouse; the defendants claimed either as lords of manors or as occupiers of the adjacent land. The demurrer to the bill was overruled, tho the defendants did not claim in common but in severalty and hence might have several defenses.[4] But since the plaintiff's claim is of an exclusive property right against all the defendants, there is one question common to all the separate actions which would otherwise be necessary to bring at law against each of the defendants, namely, whether the city had such a right of fishery as it claimed. The determina-

2. The bill in the principal case being probably by the law plaintiff, the object was to avoid bringing multiplicity of actions against the tenants. It is also settled that the tenants—the law defendants—might have brought a bill of peace in order to prevent the bringing of a multiplicity of actions against them; Powell v. Earl of Powis (1826) 1 Y. & J. 158. The appropriate common law action would be trespass.

3. (1737) 1 Atkyns 282, 2 Ames Eq. Cas. 55.

4. At the first hearing Lord Chancellor Hardwicke gave his opinion against the bill: "There is no privity at all in the case, but so many distinct trespassers in this separate fishery; besides, the defendants may claim a right of a different nature, some by prescription, others by particular grants, etc."

tion of this common question would almost certainly result in a distinct saving of litigation tho each of the defenses must later be separately litigated if the plaintiff succeeds in establishing his rights; and it would certainly do so if the plaintiff failed because that would settle all the cases at once.

Where the determination of the claim of an exclusive property right is relatively unimportant and would therefore go only a slight way toward solving the whole litigation a bill of peace would accomplish nothing substantial and should be denied. This would justify the decision of Dilly v. Doig,[5] tho the case was not put on that ground. In that case the owner of the copyright of a book brought a bill to enjoin a bookseller from selling copies of a spurious edition; later he moved to amend the bill by making another bookseller a party. The rules of equity pleading did not allow joinder because the booksellers were charged with wholly separate and independent torts; but if there had been a great many booksellers, all disputing the plaintiff's copyright, it would be difficult to distinguish the case from York v. Pilkington, *supra*. It seems quite likely, however, that the defendants were not disputing the plaintiff's right,[6] and therefore the determination of this point would be of almost negligible value, especially since only two defendants were involved.

The above argument does not, however, justify the decision in Foxwell v. Webster.[7] There the plaintiff had filed 134 bills against 134 defendants to restrain the infringement of a patent; 77 defendants ask that the suits be consolidated in order to determine the validity of the patent, each to reserve to himself the

5. (1794) 2 Ves. Jr. 486, 2 Ames Eq. Cas. 58.

6. Keyes v. Little York etc. Co. (1875) 53 Cal. 724, 732, in discussing Dilly v. Doig: "In that case there was no allegation in the bill of a claim of right on the part of the defendants to sell copies of the spurious edition of the book, and, from the nature of the circumstances detailed, there could have been no such allegation."

7. (1863) 2 Drewry & Smale 250, 2 Ames Eq. Cas. 58.

question of infringement. Relief was denied on the ground that since the plaintiff must sue each individual infringer in a separate suit, the defendants cannot insist upon being joined. The court was right, of course, on the point of equity pleading as to joinder, but since a large number of the defendants are here disputing the plaintiff's right to the patent, it would seem that either the plaintiff or defendants should have been allowed to invoke bill of peace jurisdiction, to settle this one important question common to them all.

§ 440. No claim of exclusive property right.

The only significance of the claim of an exclusive property right would seem to be that there is in such cases a common question the settlement of which may be so important as to justify a bill of peace. There has been a strong tendency, however, not to give relief unless there is either a common property interest in the many[1]—as in How v. Tenants, *supra*—or at least an exclusive property right in the one, such as in How v. Tenants and Mayor of York v. Pilkington. A case on this point which has attracted much attention is that of Tribette v. Illinois Central R. R. Co.[2] In that case a number of different owners of property in the town of Terry, destroyed by fire from sparks emitted by an engine of the railroad company, severally sued at law for damages. While these actions were pending the railroad company brought its bill in equity averring that the loss was not due to its fault but to the fault of others; that the plaintiffs in the several actions were wrongfully seeking to recover damages, and that the several actions all depend for their solution upon the same state of facts; wherefore the rail-

1. To require strictly a common property right among the many would restrict the scope of bills of peace almost to a vanishing point, especially in the U. S. where there is very little of rights of common.

2. (1892) 70 Miss. 192, 12 So. 32, 2 Ames Eq. Cas. 74.

road company asked that the actions at law be enjoined and the controversies settled in the one equity suit. It was held error to overrule the demurrer to the bill because "there must be some recognized ground of equitable interference, or some community of interest in the subject matter of the controversy, or a common right or title involved, to warrant the joinder of all in one suit; or there must be some common purpose in pursuit of a common adversary, where each may resort to equity, in order to be joined in one suit; and it is not enough that there is a *community of interest merely in the question of law or of fact involved,* etc., as stated by Pomeroy."[3]

Practically all of the opinion is devoted to combatting Pomeroy's suggested rule, by showing that the cases[4] cited as authority therefor involved merely the equity pleading question of the joinder of suits which had other bases for equity jurisdiction, and by showing what he considered to be a horrible result of the rule.[5] Unfortunately Pomeroy's rule was stated

3. Pomeroy's Equity Jurisprudence, 1st Ed., § 269; the full text is as follows: "Under the greatest diversity of circumstances, and the greatest variety of claims arising from unauthorized, public acts, private tortious acts, invasion of property rights, violation of contract obligations, and notwithstanding the positive denials by some American courts the weight of authority is simply overwhelming that the jurisdiction may and should be exercised either on behalf of a numerous body of separate claimants against a single party. or on behalf of a single party against such a numerous body, although there is no "common title" or "community of right" or "interest in the subject matter" among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body."

4. With the exception of Carlton v. Newman (1885) 77 Me. 408, 1 Atl. 194, a case where the collection of an illegal tax was enjoined which the court said appeared "to be exceptional, and to rest on peculiar grounds, not applicable to the case before us."

5. "It it is true as stated by Pomeroy . . . that mere community of interest in matters of law and fact makes it admissible to

as if it were to be mechanically applied,[6] and this presented a vulnerable point of attack; but instead of urging this criticism and then dealing with the merits of the case before them, the court assumed that any rule must be mechanical[7] and contented itself with showing that the mechanical application of the rule would lead to undesirable results. Whether the supposed "absurd" case put by the court[8] really was a horrible result would depend—just as in the principal case—upon the circumstances of the particular case. If the main question in each action was whether the defendant was negligent or whether its negligence was the proximate cause of the damage, a bill of peace might well be justified.[9] But if these two questions should be relatively unimportant, then a bill of peace would accomplish nothing and should be refused; it should likewise be denied if the consolidation would so confuse the issue and bring so many questions or

bring all into one suit in chancery, in order to avoid multiplicity of suits, all sorts of cases must be subject to the principle. Any limitation would be purely arbitrary. It must be of universal application and strange results might flow from its adoption. The wrecking of a railroad train might give rise to a hundred actions for damages, instituted in a dozen different counties, under our law as to the venue of suits against railroad companies, in some of which executors or administrators, or parents and children might sue for the death of a passenger, and, in others, claims would be for divers injuries. If Pomeroy's test be maintained, all of these numerous plaintiffs, *having a community of interest in the questions of fact and law*, claiming because of the same occurrence, depending on the very same evidence, and seeking the same kind of relief (damages) could be brought before a chancery court in one suit to avoid multiplicity of suits! But we forbear, surely the learned author would shrink from the contemplation of such a spectacle; but his doctrine leads to it and makes it possible."

6. This has been taken care of by adding § 251½ and § 251¾ to the third edition.

7. See note 5 *supra*: "Any limitation would be purely arbitrary."

8. See note 5 *supra*.

9. For a criticism of the Tribette case see 14 Harv. Law Rev. 611. See also 12 Col. Law Rev. 370; 22 Yale Law J. 53; 24 Yale Law J. 642-648; 25 Harv. Law Rev. 559.

varied interests into a case as to work a practical denial of trial by jury.[10]

§ 441. Same—tort cases giving relief.

Tho it may be difficult to agree with Pomeroy's statement as to the weight of authority,[1] there are a great many cases in which a bill of peace has been granted, but which do not comply with the narrow conditions set forth by the court in Tribette v. Illinois Central R. R. Co.[2] In Sheffield Water Works v. Yeomans,[3] the bill alleged that the plaintiff's reservoir had burst and caused loss of life and property, that under an act of Parliament commissioners were appointed to inquire into the damages and to issue certificates to claimants; that costs were to be payable by the plaintiff at the expiration of six months after the issue of such certificates, and if not paid within a further period of twenty-eight days the certificates were to have the effect of a judgment for such costs; that there was a difference of opinion as to whether the powers of the commission had expired and 1500 certificates which the plaintiffs claimed to be invalid were delivered by some of the commissioners to the defendant Yeomans, the town clerk. The bill further alleged "that unless the court interfered, the defendant John Yeomans, and other persons by his permission, would produce these invalid certificates and have them taxed, whereupon judgment would be issued, and such proceedings would seriously prejudice the plaintiff; by compelling them to defend themselves on very numerous improper taxations, occasioning them very large costs and expenses. That the question whether these certificates were valid or invalid was the

10. 62 U. of Pa. Law Rev. 453, 455: "Every man has a right to try his case with its issue clear and well defined, but if a consolidation can be had without interfering with his right, it should be granted in a proper case: if it cannot be so had, it should be denied."

1. See *ante* § 440, note 3.
2. See *ante* § 440.
3. (1866) 2 Ch. App. 8, 2 Ames Eq. Cas. 67.

same as to all of them, and that the parties named therein were too numerous to be made defendants,[4] but were properly represented by five of them who were named as defendants." It was held that the demurrer to the bill was properly overruled because the case was within the principle of a bill of peace.[5]

In National Park Bank v. Goddard[6] the plaintiff levied an attachment on L. & Co.'s stock of clothing and other property for a debt due the plaintiff. Other vendors who had sold to L. & Co. claimed to rescind for fraud and sued in replevin, those who had sold only buttons or linings or trimmings claiming whole garments. The plaintiff sued them all to protect his lien and to have adjudicated in one suit all the adverse and conflicting claims. It was held that "it was a wise

4. In England there are no constitutional restrictions and hence if the number of defendants is inconveniently large, it is enough to sue a few as representing and binding the whole, unless they have specific interests in or liens upon some specific property or fund; American Steel etc. Co. v. Wire Drawers' Union (1898) 90 Fed. 598, 605; Ayres v. Carver (1854) 17 How. 591. The rule of the Federal courts provides that "the court in its discretion may dispense with making them all parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and defendants in the suit properly before it. But, in such cases the decree shall be without prejudice to the right and claims of the absent parties." The result is that parties can be enjoined by general description and must obey if they they have notice, but they may come in and litigate the question at any time; Federal Eq. Rules 48, Street's Fed. Eq Practice, p. 1679; Cape May etc. R. R. Co. v. Johnson (1882) 35 N. J. Eq. 422. Where the equity court is exercising jurisdiction *in rem*, their decree binds every one interested in the *res* regardless of notice, provided the proceedings have had the requisite amount of publicity; Appleton Water Works Co. v. Central Trust Co. (1889) 93 Fed. 286, 288.

5. In Washington Co. v. Williams (1901) 111 Fed. 801, the converse question was presented whether holders of county bonds could maintain a bill of peace to establish the validity of the bonds and relief was denied; see 2 Col. Law Rev. 181. Wherever the law defendant may prevent a multiplicity of suits against him by numerous plaintiffs, the latter should be able to avoid the necessity of the bringing of such actions.

6. (1891) 62 Hun 31, 2 Ames Eq. Cas. 82.

exercise of discretion of the court to prevent the dissipation of this property and to take possession of the same itself until the determination of these rival claims and the ascertainment of the rights and interests of each." There was no claim of an exclusive property right by the plaintiff and the claims of the defendants were independent of each other, but there was one important common question, namely, whether L. & Co. had intended to defraud their vendors.[7]

§ 442. Same—tort cases denying relief.

In Jones v. Hardy[1] the bill alleged that the plaintiff's agent Hardy had, without authority, made sales of the plaintiff's crops and used the proceeds; the bill was brought against Hardy, his vendees and a subvendee. Relief was denied on the ground that "the causes of suit are entirely separate and distinct from each other and depend for their adjustment on no common or connected right, relation or necessity." This reasoning has already been criticised;[2] but the decision may have been justified on the ground that the common question of the fact of agency was probably much less important than the questions which were not common, namely, the authority as to each item sold, whether there was a sale in each case, whether there was estoppel or payment, or satisfaction, etc.

In Lehigh Valley R. R. Co. v. McFarlan[3] the plaintiffs, operating a canal which crossed a river, main-

7. In Ballou v. Hopkinton (1855) 4 Gray 324, the bill alleged that the various defendants, being upper proprietors were threatening to draw off water from the reservoir and that this would damage the plaintiff's mills. The demurrer to the bill was overruled on the ground of preventing multiplicity of suits, but it is not clear whether it was a bill of peace or merely was a joinder of equity suits as a matter of pleading; see *ante* § 438.

1. (1899) 127 Ala. 221, 28 So. 564, 2 Ames Eq. Cas. 91.
2. See *ante* § 440.
3. (1878) 30 N. J. Eq. 135, 2 Ames Eq. Cas. 85.

tained a dam on the river. One of the defendants had brought an action at law against the plaintiff for unlawful flowage of the land and the other three defendants had brought actions for diversion of the water. The plaintiff then brought his bill against all of them to determine whether the dam was lawful. Relief was denied properly because there was really no common question; if there was plenty of water the use of the water by the plaintiff would not be wrongful whereas any flooding by the plaintiff of the land of the first mentioned defendant would be wrongful. If the plaintiff had sued only the three defendants there would have been raised practically the same question as was raised in Tribette v. Illinois Central R. R. Co. *supra;* the common question of wrongful diversion would probably have been relatively important and the only sound justification for refusing relief would have been that there were only three defendants and therefore there would not be much saving of litigation.[4]

§ 443. Collection of void taxes.

If any one taxpayer is allowed to enjoin the collection of an illegal tax[1] several taxpayers may join in the suit as a matter of equity pleading.[2] If a single tax payer is not thus allowed to sue, equity may—and perhaps by the weight of authority does—take

4. Even if there are only two parties against one there may well be a bill of peace; but if the number is small courts may properly, as a matter of discretion, refuse relief unless the litigation which would thus be saved would be relatively complicated and expensive; see 20 Harv. Law Rev. 325.

1. As, for example, to prevent or remove a cloud on title to land; Lockwood v. St. Louis Bk. (1856) 24 Mo. 20. In New England states—perhaps because of the early limited equity jurisdiction—apparently no equitable relief is given in such cases to one tax payer; Brewer v. Springfield (1867) 97 Mass. 152. On the other hand, in some jurisdictions equity will relieve the single taxpayer tho no cloud on title is involved; Vieley v. Thompson (1867) 44 Ill. 9.

2. See *ante* § 438.

jurisdiction on bill of peace grounds at the suit of several tax payers.

In McTwiggan v. Hunter[3] the bill alleged that the tax was invalid because the assessors had intentionally omitted the property of the G. Company from the assessment list. The demurrer to the bill was overruled: "While it is true that equity will not enjoin the collection of a tax at the suit of an individual taxpayer on the ground of illegality when the illegality affects him alone, . . . yet, when the illegality extends to the whole tax so that the question involved is the validity of the whole tax and its assessment on every person taxed, equity may properly take jurisdiction at the suit of one or more of the taxpayers suing in behalf of all the taxpayers as well as in his or their own behalf, since the rights of all persons interested may be more conveniently and speedily determined by its decree in one suit than by leaving them to work out their rights by individual suits, and a multiplicity of suits will thereby be avoided."[4]

3. (1895) 18 R. I. 776, 30 Atl. 962, 2 Ames Eq. Cas. 71. For an extended discussion of the point see 10 Col. Law Rev. 564-566. In German Alliance Insurance Co. v. Van Cleave (1901) 191 Ill. 410, 61 N. E. 94, numerous insurance companies were allowed to unite in a bill to refund the amount of a tax on premiums paid under protest.

4. In City of Chicago v. Collins (1898) 175 Ill. 445, 51 N. E. 907, 2 Ames Eq. Cas. 92, three hundred and seventy-three residents and taxpayers of Chicago, suing in behalf of themselves and all others similarly situated filed a bill to enjoin the city from enforcing a wheel tax ordinance affecting three hundred thousand owners of vehicles, on the ground that the city had no power to pass such an ordinance. It was held that the plaintiffs' bill was maintainable because "their grievance is precisely the same and arises from the same cause. The various parties aggrieved, altho not jointly interested, are allowed to sue together for the express purpose of avoiding a multiplicity of suits and to have the controversy settled in one hearing." The further ground upon which the court rested their decision—namely, the breach of a public trust by the municipality—is of course untenable, because a municipality is not a trustee in the narrow sense. See *ante* Chap. V.

In the somewhat similar case of Dodd v. City of Hartford[5] relief was refused partly on the ground of the public interest in the speedy collection of taxes and partly because "no property, right or franchise held by the petitioners in common[6] is claimed to be affected by the proceedings of the city." The court further contends that the remedy at law of each petitioner is adequate because "the multiplicity of suits which the petition seeks to avoid does not affect injuriously any one of the petitioners. No one of them has occasion to expect any such multiplicity affecting himself. One suit is all that any one of them has to fear." There are two answers to this last argument: (1) If the amount of the assessment to each person is so small as barely to cover the attorney's fees, the remedy at law can hardly be considered adequate; (2) the avoidance of bringing several actions by many petitioners has usually been regarded as much the object of a bill of peace as the prevention of several actions *against* one petitioner.[7]

§ 444. Contractual and statutory pecuniary obligations.

There seem to be only a few instances in the books where a creditor has sought to maintain a bill of peace against several debtors,[1] a few where a debtor has tried

5. (1856) 25 Conn. 232, 2 Ames Eq. Cas. 69. In that case over three hundred petitioners sought to join in a suit to restrain the collection of a sewer assessment claimed to be illegal.

6. See *ante* § 440 for a criticism of this requirement.

7. See *ante* § 437.

1. See Best v. Drake (1853) 11 Hare 371, note, telling of the following bill of peace in the time of Lord Nottingham: "A bill in the Chancery was this term preferred by a widow against 500 persons, to answer what moneys they owed her husband; the bill was above 3000 sheets of paper, to the wonder of most people; but the Lord Chancellor looking on it as vexatious, for it would cost each defendant a £100 the copying out, he dismissed the bill and ordered Mr. *Newman* the councellor, whose hand was to it, to pay the Defendant the charges they have been at." For a modern in-

to maintain such a bill against several creditors (or *vice versa*[2]) and very few where several debtors have succeeded against one creditor;[3] but the enforcement or non-enforcement of pecuniary obligations imposed by statute has frequently been sought in equity on bill of peace grounds. Although a few cases have given relief, the tendency has been to refuse it; in many of the cases, however, relief has been properly refused because of the comparative unimportance of the common question. In Tompkins v. Craig[4] the plaintiff, receiver of an insolvent bank, brought a bill against all the stockholders to collect an assessment of 50% levied under an Iowa statute. Relief was denied "because the statute does not impose a joint but a several liability upon the defendants and they have no common interest in the decree asked for by the bill. . . . Each defendant may desire to put up a different defense. One stockholder may have paid his assessment in whole or in part; another may seek to raise the question whether the Iowa court had jurisdiction to make the levy; a third may wish to attack the amount of the

stance where the bill was allowed to the assignee of an insolvent corporation against stockholders to recover unpaid balances of stock subscriptions, see Cook v. Carpenter (1905) 212 Pa. 165, 61 Atl. 799; 19 Harv. Law Rev. 213.

2. In Smith v. Bank of New England (1897) 69 N. H. 254, 45 Atl. 1082, 2 Ames Eq. Cas. 79 the obligation might, perhaps, be classed as contractual, but only a question of equity pleading was involved in the joinder because equity had jurisdiction in each case on the grounds of trust; see *ante* § 438. In Washington Co. v. Williams (1901) 111 Fed. 801, several holders of county bonds tried unsuccessfully to join in trying the validity of their bonds; see 2 Col. Law Rev. 181.

3. In Home Co. v. Va. Co. (1902) 113 Fed. 1, several insurance companies had insured the same property with stipulations as to apportionment of loss; each claimed to have been deceived by the same false statement as to the value of the property insured; their bill of peace was held good on demurrer because the "insurance companies have a common interest in defeating the claims of the insured." See 10 Col. Law Rev. 265; 23 Harv. Law Rev. 480, 640.

4. (1899) 93 Fed. 885, 2 Ames Eq. Cas. 87.

assessment; another may aver that his subscription was void from the beginning; and still other defenses, which need not be specified, are readily conceivable." The decision was quite sound because the only common question had already been passed upon by an Iowa court,[5] namely, whether all the stockholders were liable to assessment and the percentage of assessment. As the court pointed out, a proceeding to determine merely how large the assessment should be is properly sustainable as a bill of peace;[6] in such a case the only question to be passed upon is a common question.[7]

B. To Avoid or Prevent Numerous Suits of One Against One.

§ 445. Bill to quiet title[1]—ejectment.

An action of ejectment was unlike other common law actions in that the person named as plaintiff there-

5. In State v. Union etc. Bank (1897) 103 Iowa 549, 70 N. W. 752.

6. Bailey v. Tillinghast (1900) 99 Fed. 801.

7. In Marsh v. Kaye (1901) 118 N. Y. 196, 2 Ames Eq. Cas. 89, a statute had made directors of certain corporations personally liable for the debts contracted on behalf of the corporation, payable within one year; a creditor filed a bill on behalf of himself and others similarly situated, against the receiver, seventeen directors and fifty creditors of the Ladies' Deborah Nursery & Child's Protectory, to enforce the directors' liability and to distribute the amount recovered among those entitled. If the liability of the directors had been limited, equity would have taken jurisdiction on the ground that the fund to accrue from such liability was a trust fund to be distributed ratably if not enough to satisfy all their claims; Weeks v. Love (1872) 50 N. Y. 568, 571. The bill was not maintainable as a bill of peace because the only common question—whether the corporation was within the terms of the statute—was probably greatly outweighed in importance by the many questions not common, namely, whether each creditor's claim was a debt of the corporation, whether the particular debt was payable within a year, etc. It is to be noted that there were numerous parties on each side—a fact likely to be productive of a great many questions.

1. Bills to remove cloud on title are frequently spoken of as

in was fictitious; hence if the defendant succeeded in getting the verdict and judgment, the matter did not become *res judicata* because the real plaintiff need only to name another fictitious lessor as plaintiff and begin again, *ad infinitum*. The sole relief of the law defendant was a bill in equity to enjoin the bringing of further ejectment actions. In Lord Bath v. Sherwin[2] the law plaintiff had thus sued in ejectment five times, the law defendant gaining a verdict each time. The law defendant thereupon brought a bill in equity asking for a perpetual injunction to stay the law plaintiff from bringing any more ejectments. In giving relief: "As to the objection that the common law having fixed no bounds to the number of trials in ejectment persons were at liberty to prosecute in that way as often as they pleased, and therefore a court of equity ought not to restrain their right, it was answered that the method of trying the title to inheritances by ejectment was of no very long standing, for the ancient way of trying such rights was in real actions; and there the wisdom of the common law had fixed proper limits to such prosecutions for preventing vexations and endless contests; and, as so great an inconvenience, and even abuse of the law was practiced in this case, it was highly reasonable that a court of equity should interpose."

In many jurisdictions a plaintiff sues in ejectment in his own name and therefore a judgment in favor of the law defendant in one action would logically be conclusive; but the notion that a plaintiff was not thus barred had apparently become so firmly fixed[3] that a plaintiff is not limited unless by statute[4] or equity.

bills to quiet title; this sometimes produces confusion, because the bases for jurisdiction are different. See *ante* §§ 413-419 for bills to remove cloud on title.

2. (1706) Precedents in Chancery 261; (1709) 4 Brown's Cases in Parliament (Tomlin's Ed.) 373, 2 Ames Eq. Cas. 95.

3. And the reason for its existence in the first place was forgotten.

4. In Pennsylvania, for example, there is a statutory limitation to two actions; see Dishong v. Finkbiner (1891) 46 Fed. 12.

Where there is no statute equity should give an injunction if there has been a fair adjudication of the controversy.[5]

§ 446. Same—repeated actions of trespass.

Tho a judgment on the merits for the defendant in an action of trespass *quare clausum* is final and conclusive as to the particular act of trespass alleged by the plaintiff, it does not prevent the latter from bringing another action for another alleged act of trespass on the same land, raising the identical property questions as the first action; and there is no limit to the number of actions which may thus be brought if the law plaintiff remains unconvinced. In these circumstances, if there has been a fair adjudication of the merits of the case at law, equity should interfere just as in ejectment cases,[1] in order to prevent vexation and endless litigation. Equity will not interfere until there has been such adjudication.[2]

Where the equity plaintiff complains not of repeated actions of trespass but of repeated acts of trespass, relief has sometimes been granted on the ground of avoiding the necessity of bringing a multiplicity of actions at law.[3] But since the plaintiff is not under the necessity of bringing a separate action for each act

5. Even one successful verdict in favor of the law defendant may be enough; Peterson Co. v. Jersey City (1853) 9 N. J. Eq. 434; or an adjudication of the title in a previous equity proceeding; Pratt v. Kendig (1889) 128 Ill. 293, 298, 21 N. E. 495. In Thompson's Appeal (1884) 107 Pa. 559 the vexatious institution and abandonment of repeated actions was held to warrant an injunction, the court suggesting that this tended to create a cloud on title; see 22 Harv. Law Rev. 371.

1. See *ante* § 445.

2. Lord Tenham v. Herbert (1742) 2 Atkyns 483, 2 Ames Eq. Cas. 97; "But where a question about a right of fishery is only between two lords of manors, neither of them can come into this court till the right is first tried at law."

3. See *ante* § 195.

of trespass[4] it is obvious that the multiplicity of actions thus avoided is of a much milder type than that where the equity plaintiff has been subjected to repeated actions of ejectment or trespass. Such actions seem hardly to deserve the name of bill of peace; but if they are so called, the distinction between the two types of cases should not be overlooked.[5]

§ 447. Numerous criminal prosecutions.

Where the equity plaintiff is being subjected to numerous prosecutions for alleged infractions of a statute or ordinance and the equity plaintiff insists either that he has not committed the acts alleged or that the statute or ordinance is invalid, equity will usually interfere to prevent such vexation and oppression. In Third Ave. R. R. Co. v. The Mayor, etc., of N. Y.[1] the city of New York had brought seventy-seven penal actions in a justice's court against the plaintiff for running a passenger car within certain specified limits of the city without a license. If the actions had been brought in a court of record the court would have had power to consolidate them,[2] but a justice court had

4. He may reduce the number of actions at law by waiting till just before the close of the statutory period of limitation. If the statutory period is short and there is no satisfactory way of compensating the plaintiff for attorney's fees etc., equity should give relief; see *ante* § 195. Where the trespasser is insolvent, an injunction is usually given; see *ante* § 201. But see Mechanics' Foundry v. Ryall (1888) 75 Cal. 601, 17 Pac. 703.

5. The distinction between repeated acts and repeated actions was apparently lost sight of in 22 Harv. Law Rev. 371.

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1. (1873) 54 N. Y. 159, 2 Ames Eq. Cas. 102.

2. This preserves the right of trial by jury which is of paramount importance in criminal and penal cases involving questions of fact. Where the question involved is one of law, a perpetual injunction against all the prosecutions may be given. In City of Hutchinson v. Beckham (1902) 118 Fed. 399 the city of Hutchinson had passed an ordinance imposing a license tax of $1200 a year on jobbers who did business in the city but did not maintain their principal place of business therein. The plaintiffs, jobbers of Kan-

no such power.[3] The plaintiff did not ask "to restrain the defendants from *obtaining a decision*[4] by the justice's court on the question involved in the actions pending therein; but the continuance of the prosecution of one of them is suffered and permitted and an injunction to restrain and forbid the proceedings in the others of them is only asked until that which shall be proceeded in can be finally heard and determined." Since the question to be decided in all the suits was the same and a single one, depending on the same facts, the relief asked for was given, the court pointing out that it was substantially what would have been obtained if the actions had been brought in a court of record, by a consolidation of them.

sas City, Mo., insisting that the ordinance was invalid, refused to pay the license whereupon the city caused the arrest of their agents and were threatening to make further like arrests. The plaintiffs thereupon asked that the court declare the ordinance void and perpetually enjoin the defendants from enforcing it. The bill was held good on demurrer because of the probable delay in determining the validity of the ordinance and the annoyance of defending a multiplicity of actions causing daily interruptions to their business. See *ante* § 245.

3. In Galveston etc. Ry. v. Dowe (1888) 70 Tex. 5, 7 S. W. 368, the law plaintiff brought separate actions in a justice court on a number of time checks issued by the law defendant and to which the latter insisted that it had a good defense. The justice court had power to consolidate the actions but refused to do so because if consolidated the amount involved would be over $20 and he would lose jurisdiction. It was held error to dismiss the bill of the law defendant asking that further actions be enjoined.

4. A decision against the law defendant in an inferior court is not necessarily a bar to a bill of peace. In Skinkle v. City of Covington (1885) 83 Ky. 420 there was a city ordinance imposing a penalty for each 24 hours any person should hold possession of any of the streets, commons etc. of the city. The plaintiff used and claimed as his own property a certain river bank which the city also claimed; numerous warrants had been issued against him and he had been tried and fined in the mayor's court from which there was no appeal. It was held error for the court below to refuse relief.

CHAPTER XI.

Miscellaneous Topics.

§ 448. Equitable conversion.

Where there is a peremptory direction in a will or deed that land shall be sold or money invested for the benefit of certain beneficiaries, equity regards—especially for purposes of devolution—the prospective sale or investment as if it had taken place at the time the will[1] or deed[2] took effect; this is usually called the doctrine of equitable conversion. Historically, the adoption of such a rule owed much to the influence of the maxim that equity regards that as done which ought to be done;[3] were it not for this maxim equity might very well have regarded the right of the beneficiaries as being realty till the sale actually took place or as personalty till the investment actually took place,[4] just as

1. In Scudamore v. Scudamore (1720) Precedents in Chancery 543, money was bequeathed by S to her daughter, to be invested in land upon certain trusts; the daughter died without having made the investment. It was held that the money should go to the heir of the beneficiary and not to his next of kin. In Morris v. Griffiths (1884) 26 Ch. D. 601 the direction to the executors to sell real estate was construed to be imperative and hence the share of a deceased beneficiary went to his next of kin and not to his heir though the real estate remained unsold at the time of his death.

2. In Clarke v. Franklin (1858) 4 Kay & Johnson 257 the direction to sell contained in a deed was held to operate in equity as a conversion of the property into personalty from the time the deed was delivered.

3. See *ante* § 20; § 112 note 8; § 318; see also Moncrief v. Ross (1872) 50 N. Y. 431.

4. Where the beneficiaries are all *sui juris* and agree to do so, they may—before the conversion actually takes place—elect to take the property in its original form, because the trustees in such a case must obey the beneficiaries rather than the directions of the creator of the trust; this is usually referred to as the doctrine of equitable

in the case where the direction to sell is not imperative.[5] By strict logic equity—in following the maxim—should have regarded the conversion as taking place at the time that the trustees should have converted it;[6] but unless there was a time fixed for such conversion, it would be the duty of the trustees to make the sale or the investment within a reasonable time and it would be obviously undesirable to have the question of the coming into existence of equitable property rights open to such an uncertainty as the lapse of a reasonable time.[7] Hence courts were compelled—consciously or unconsciously—to fall back upon the certain time of the taking effect of the will or deed.

reconversion. See *ante* § 318; 14 Mich. Law Rev. 252; Tiffany, Real Property § 107. Where the beneficiaries are not all *sui juris* or where they cannot all agree to reconvey the property, it may be suggested that the beneficiaries have really no right to the property in its unconverted form and that therefore the doctrine of equitable conversion in such cases was a necessity; in substance, however, they do have a right to the property in its unconverted form, even though they can enforce it only by compelling the trustees to carry out the terms of the trust with reference to it. The rule is probably of value in helping to make certain the carrying out of the intention of the creator of the trust.

5. In Hovey v. Dary (1891) 154 Mass. 7, 27 N. E. 659, the executors were empowered and authorized but not directed to sell real estate; it was held that the beneficiaries' rights should be considered as realty till the sale actually took place; hence upon the death of a beneficiary before such sale his share passed to his heir and not to his next of kin. See also Darlington v. Darlington (1894) 160 Pa. 65, 28 Atl. 503; 9 Col. Law Rev. 81. Nor is it sufficient that a testator express the wish that the land shall be treated as money or *vice versa*; Att'y Gen'l v. Mangles (1839) 5 M. & W. 120. It is not necessary, however, that there be a direction in terms inperative; in Lent v. Howard (1882) 89 N. Y. 169 the power of sale was held to be imperative because the sale was necessary to carry out the testator's scheme; see 6 Col. Law Rev. 56. That the trustees have no power to bring about an equitable conversion without such direction, see Earlom v. Saunders (1754) Ambler 241.

6. See *ante* § 20.

7. See *ante* § 118 note 10. Apparently the weight of authority is that the doctrine applies, however, even if a time is fixed for the conversion; Handley v. Palmer (1900) 103 Fed. 39 (direction to sell

Since the rule is at least dependent upon if not caused by the right of the beneficiaries to compel the trust be carried out, it is usually limited in its operation to the carrying out of the purposes of the trust.[8] Hence, if the trust comes to an end because of the death of all the beneficiaries without issue, so that there is a resulting trust to the representatives of the creator of the express trust, the rule does not apply to the resulting trust;[9] and the same reasoning has been applied where there has been only a partial failure of the trust if created by will,[10] but not where the trust was created by deed.[11] The rule does not apply so as to change the

at the end of twenty years); 21 Harv. Law Rev. 288; Tiffany, Real Property § 106. And where a life estate in land was given to a widow and the trustees were directed to sell after the widow's death, it was held that altho the widow's life estate was realty, the right of the beneficiary should be considered as personalty from the death of the testator; Allen v. Watts (1892) 98 Ala. 384, 11 So. 646. See also Welsh v. Crater (1880) 32 N. J. Eq. 177.

8. In England transfer taxes are determined with reference to the doctrine. See Att'y Gen'l v. Mangles (1839) 5 M. & W. 120. See also Mellon v. Reed (1888) 123 Pa. St. 1, 17, 15 Atl. 906, holding that the statute of frauds does not apply to an oral contract by a beneficiary to sell his interest because, strictly speaking, he had no interest in the land but only in the proceeds.

9. Curteis v. Wormald (1878) 10 Ch. D. 172; "[the rule] does not affect the rights of the persons who take by law independent of the will."

10. In Ackroyd v. Smithson (1780) 1 Brown Ch. 503, there was a devise of land to trustees to sell and pay debts and legacies and to divide the remainder between fifteen legatees; two of these legatees died before the testator. It was held that these lapsed shares went to the testator's heir and not to his next of kin. For a thorough discussion of the effect of this decision see 19 Harv. Law Rev. 1-20. Similarly, if there is a sale directed for a purpose which does not exhaust the entire beneficial interest, such surplus will go to the testator's heir if the latter died before the sale; Dixon v. Dawson (1825) 2 Sim. & St. 327; but if he died after the sale it goes to his next of kin because at the time of his death he had no real estate; Graham v. Dickinson (1848) 3 Barb. Ch. (N. Y.) 169; 21 Harv. Law Rev. 630; 22 Harv. Law Rev. 451.

11. Clarke v. Franklin (1858) 4 K. & J. 257 (direction to turn over part of the proceeds of sale to a charity was void; the lapsed share was treated as personalty).

requirement that all the trustees shall execute a deed of realty;[12] but as to whether it prevents the attachment of a judgment lien on land before the actual sale takes place there is a conflict of authority.[13] The better view is that the rule does not apply to deprive a widow of her dower right.[14]

The doctrine of equitable conversion has also been applied where an unconditional direction to sell has proceeded from a court of competent authority and the owner dies before the sale actually takes place.[15] And where the property of one who is not *sui juris* has actually been sold or invested by order of court during such disability, it is usually held that equity will protect the interests of such incompetent and his representatives by regarding his property right as if no conversion had taken place,[16] till such disability is removed.[17]

§ 449. Account.

A strict bill for an account—as distinguished from a bill of equitable assumpsit[1] and from an accounting which is incidental to an equity suit brought on other

12. Wilder v. Ranney (1884) 95 N. Y. 7.

13. That it does, see Beaver v. Ross (1908) 140 Ia. 154, 118 N. W. 287, discussed in 9 Col. Law Rev. 179; that it does not, see Eneberg v. Carter (1889) 98 Mo. 647, 12 S. W. 522.

14. Hutchings v. Davis (1903) 68 O. St. 160, 67 N. E. 251, discussed in 3 Col. Law Rev. 590.

15. *In re* Estate of Stinson (1910) 1 Ir. 13 (next of kin held entitled).

16. Wetherill v. Hough (1894) 52 N. J. Eq. 683; 29 Atl. 592.

17. For a much more exhaustive discussion of equitable conversion, see Langdell, Brief Summary of Equity Jurisdiction, 260-303; 18 Harv. Law Rev. 1-22; 83-104. For a discussion of equitable conversion by contract see *ante* §§ 83, 108-119; 19 Harv. Law Rev. 81-85; 13 Col. Law Rev. 369-388; 12 *id.* 155.

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1. See *infra*. For a discussion of strict bills of account see Langdell, Brief Summary of Equity Jurisdiction 73-98; 2 Harv. Law Rev. 241-267. For a discussion of bills of equitable assumpsit see Langdell, Brief Survey 99-124; 3 Harv. Law Rev. 237-262.

grounds[2]—lies against a fiduciary who is under a common law duty[3] to account for property which he holds for the benefit of the plaintiff. This common law obligation was imposed upon guardians,[4] bailiffs,[5] and receivers,[6] and the common law remedy was the action of account which was gradually superseded by debt and indebitatus assumpsit[7] and by a bill in equity for an account. Such a bill will not lie against a bailee[8] or against a debtor.[9]

2. For example, in a suit to enforce a trust there is nearly always a reference to a master to take an account of the trust property; for this reason a bill to enforce a trust is frequently spoken of as a bill for an account though the obligation may be one which is purely equitable; see *ante* § 274. In bills to foreclose a mortgage and to wind up a partnership there is frequently an incidental accounting.

3. The basis for equity jurisdiction here was the inadequacy of the common law action of account due to its clumsiness, delay, and expense.

4. In this country guardians usually settle their accounts in the probate court; see 2 Harv. Law Rev. 259.

5. This includes stewards and such agents as factors, commission merchants, auctioneers, stock brokers, etc. Such agents are more common in England than in this country, having charge of large landed estates; see 2 Harv. Law Rev. 260; Mackenzie v. Johnston (1819) 4 Maddock 373, 1 Ames Eq. Cas. 445; Makepeace v. Rogers (1865) 4 DeG., J. & S. 649.

6. Apparently a receiver is substantially a trustee whose sole duty is to pay over money; see *ante* § 274.

7. Wells v. Ross (1817) 7 Taunt. 403. And see *ante* § 257 as to the development of procedure allowing indebitatus assumpsit against a common law trustee.

8. See *ante* § 251; detinue is usually an adequate remedy against a bailee.

9. Dinwiddie v. Bailey (1801) 6 Ves. 136, 1 Ames Eq. Cas. 442 (claim of insurance broker against his principal). See also Padwick v. Stanley (1852) 9 Hare 627: "the right of the principal rests upon the trust and confidence reposed in the agent, but the agent reposes no such trust or confidence in the principal." Since the ordinary bank deposit creates a debt, account will not lie against the bank; Foley v. Hill (1848) 2 H. of L. 28, 1 Ames Eq. Cas. 446. For a similar holding as to the effect of a tontine insurance policy, see Uhlman v. N. Y. Life Ins. Co. (1888) 109 N. Y. 421. If a vendee of property agrees to turn over to his vendor a portion of the profits of his business he becomes as to such funds a fiduciary and a strict bill of account

A bill for an equitable assumpsit, however, will lie against a debtor if the accounts between him and his creditors are so complicated that the court in its discretion[10] deems it unwise to submit the matter to a jury.[11] Failure to note the distinction between this and a strict bill for account has led to some confusion in the decisions.

§ 450. Subrogation.

One who stands in the position of a surety[1] is equit-

will lie; Pratt v. Tuttle (1884) 136 Mass. 233, Ames Trust Cases. 32; see also Channon v. Stewart (1882) 103 Ill. 541 (one-half of profits to be paid to plaintiff for services as manager); 13 Col. Law Rev. 166. But if it is to be paid by way of royalty, there is no fiduciary relation and a strict bill of account does not lie; Preston v. Smith (1895) 156 Ill. 359, 40 N. E. 949; 23 Harv. Law Rev. 304.

10. The mere fact that accounts are complicated is not enough; Uhlman v. New York Life Ins. Co. *supra*. Though the matter is properly one within the sound discretion of the court—1 Col. Law Rev. 321—there has been a tendency for courts to make the rule mechanical. Thus, in Phillips v. Phillips (1852) 9 Hare 471, 1 Ames Eq. Cas. 449 it was said that unless the accounts were mutual equity would not take jurisdiction; but since there is no necessary connection between mutuality and complication, the notion did not long survive; Hemings v. Pugh (1863) 4 Giff. 456, 458; Fluker v. Taylor (1855) 3 Drew, 183. In Haywood v. Hutchins (1871) 65 N. Ca. 574, 1 Ames Eq. Cas. 459 the court suggested that it would be enough if the accounts were mutual, but this position seems equally untenable.

11. Taff Vale Ry. Co. v. Nixon (1847) 1 H. of L. 111, 1 Ames Eq. Cas. 454; Harrington v. Churchward (1860) 29 L. J. Rep. Ch. 521, 1 Ames Eq. 457. Where a strict bill of account is brought the burden is upon the plaintiff to establish only that the defendant is under an obligation to account, just as if he had brought a common law action of account; in a bill of equitable assumpsit, on the other hand, the burden is upon the plaintiff throughout, just as if he had brought indebitatus assumpsit at law.

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1. In subrogation cases the term surety has received a very wide interpretation. Thus a fire insurance company which has paid a fire loss is entitled to be subrogated to the right of the insured to recover against the tort feasor responsible for the loss; Chicago & Alton R. R. v. Glenny (1898) 175 Ill. 238, 51 N. E. 896. But an officious intermeddler is not entitled; 13 Harv. Law Rev. 297 discussing Brown v.

ably[2] entitled, upon paying the creditor in full,[3] to an assignment of all the securities[4] for the debt which the creditor has obtained from the principal debtor or from co-sureties.[5] The basis of equity jurisdiction is substantially that of constructive trust: since the creditor has been paid he is not entitled to hold or enforce the securities for his own benefit; since the principal debtor has not paid he is not entitled to have the securities delivered up and cancelled; obviously, therefore, the surety, who has paid is best entitled to them even tho

Rouse 125 Cal. 645, 58 Pac. 267; 24 Harv Law Rev. 161; 9 Col. Law Rev. 63-66. As to the right of an insurance company to be subrogated to the right of the insured to enforce specific performance against a vendee of the premises, see 1 Col. Law Rev. 113, *ante* § 118, note 7. There has been an unfortunate tendency to extend the doctrine—or at least the terminology—of subrogation to cases where there is no relation of suretyship; see 25 Harv. 725, discussing *In re* Beavan (1912) 1 Ch. 196 (recovery of money advanced to a lunatic).

2. Since subrogation involves commanding the creditor to assign his rights to the surety, such a right cannot be enforced at common law; see *ante* § 5.

3. The right does not arise till after the creditor is paid in full because it might embarrass the principal debtor to compel a part assignment of the creditor's claim; see *ante* § 262. It might also prejudice the creditor's right of recovery against the principal debtor if a surety upon paying part were allowed thus to compete with him; Musgrave v. Dickson (1896) 172 Pa. 623, 33 Atl. 705; 8 Col. Law Rev. 147.

4. Logically he should be entitled also to an assignment of the main debt itself; i. e. he should be entitled to all the rights the creditor had the moment *before* payment; or, to put it differently, payment by a surety should be regarded not as a payment but as a purchase of the claim. But the Statute of Anne providing that payment should extinguish a debt was held to apply to payments by a surety; Copis v. Middleton (1823) Turner & Russell 224. This was later changed by Statute 19 & 20 Vict. c. 97, § 5, which placed the surety automatically in the shoes of the creditor. In this country the matter is usually dealt with by holding that in equity the claim is kept alive for the benefit of the surety; Hill v. King (1891) 48 O. St. 75.

5. As against co-sureties the surety who pays can recover only a proportional share based upon the number of solvent sureties within the jurisdiction; Preston v. Preston (1847) 4 Grattan 88.

he did not bargain for the right[6] and did not know that any securities were held.

The right to be subrogated—which is always purely equitable—should be carefully distinguished from the rights of the creditor against the principal or co-sureties to which the surety becomes subrogated; the latter may be either legal[7] or equitable.[8] A failure to note this distinction has led to much confusion and some injustice. Thus, the surety should not be barred by the statute of limitations in enforcing the claims to which he is subrogated until the creditor would have been barred,[9] the creditor holding the claim and securities therefor solely as a fiduciary for the surety from the moment of payment by the latter.[10] But in some jurisdictions the statute applying to obligations founded upon unwritten contract claims has been held to begin to run against the surety from the moment of payment;[11] in others, the statute as to general equitable relief has been held to apply.[12]

§ 451. Indemnity or reimbursement.

In addition to the equitable right to the assignment of all the creditor's rights against the principal

6. New York State B'k v. Fletcher (1830) 5 Wend. 85. See also Chicago & Alton R. R. v. Glenny *supra*.

7. As examples of legal rights see Fulkerson v. Brownlee (1879) 69 Mo. 371 (right to bring ejectment); Bittick v. Wilkins (1872) 7 Heiskell 307 (judgment); Com'th v. Straton (1831) 7 J. J. Marshall 90 (bond of indemnity).

8. As examples of equitable rights see Goddard v. Whyte (1860) 2 Giffard 449 (right to foreclose mortgage); Uzzell v. Mack (1843) 4 Humphrey 319 (vendor's lien); Pierce v. Holzer (1887) 65 Mich. 263, 32 N. W. 431 (right to trace trust fund).

9. This is the majority view; Smith v. Swain (1854) 7 Richardson, Eq. (S. C.) 112.

10. And therefore no statute of limitations should apply to the right to be subrogated unless and until the creditor repudiates his fiduciary obligation to the knowledge of the surety. See *ante* § 263; 13 Harv. Law Rev. 309.

11. Harrah v. Jacobs (1888) 75 Ia. 72, 39 N. W. 187.

12. Neal v. Nash (1872) 23 O. St. 483; 13 Harv. Law Rev. 309.

debtor as soon as he has paid the entire debt,[1] the surety has also the right to proceed directly against the principal debtor for reimbursement,[2] as soon as he has paid any part[3] of the debt. This right was first recognized in equity[4] but later common law courts allowed an action for money paid to the defendant's use;[5] and altho it was at first regarded as quasi contractual—to prevent the principal debtor from being unjustly enriched at the surety's expense—it has become so well settled and understood that it has developed into a genuine implied contract arising at the moment the surety becomes bound,[6] tho of course no cause of action arises thereon till payment.[7] The better view and the trend of modern authority allows reimbursement to a morally innocent tort feasor against his joint tort feasor who is not morally innocent;[8] and in some

1. See *ante* § 450.

2. This term is preferable to indemnity because the latter is sometimes used to mean exoneration.

3. There is apparently no requirement that he pay all, the obligation of the principal debtor being construed as an obligation to reimburse him for any amount that he is compelled to pay. The statute of limitations therefore begins to run at the moment of paying any part, as to that part; Davies v. Humphreys (1840) 6 M. & W. 153.

4. See Layer v. Nelsen (1687) 1 Vern. 456. Before that time it was necessary for the surety to take a counterbond from his principal.

5. Decker v. Pope (1757) 1 Selw. N. P. 76 n.

6. Appleton v. Bascom (1841) 3 Metc. 168. If the obligation were regarded as quasi contractual, it would not arise till payment.

7. The right of subrogation is usually more valuable than the right of reimbursement because the latter gives no right to securities of any sort; but sometimes the right of reimbursement is valuable while the right of subrogation is worthless; e. g. where the creditor's right is barred by lapse of time as against the principal debtor but not as against the surety; Sibley v. McAllaster (1836) 8 N. H. 389.

8. For example, if an agent, in obedience to the orders of his principal, innocently commits a tort against a third person, the principal is bound to reimburse him for the liability he incurs, since as between the two the principal should ultimately bear the loss; Greene v. Goddard (1845) 9 Met. 212; 22 Harv. Law Rev. 131; Woodward, Quasi Contracts § 258.

of these tort cases it is practically impossible to work out any contractual basis for the plaintiff's right.[9]

§ 452. Contribution.

In addition to the equitable right to stand in the creditor's shoes as to all the latter's rights against the co-sureties,[1] the surety has a direct right to compel contribution from them as soon as he has paid more than his share of the debt.[2] This right was first recognized in equity[3] and then later at law;[4] but the equitable remedy is frequently more advantageous because the surety may join the co-sureties in one suit[5] and may recover according to the number of solvent sureties within the jurisdiction,[6] while at law he can recover only the

9. In the case of the innocent agent against his principal, *supra*, it would not be difficult to regard such an obligation as a part of the principal's contract with his servant; but where there is no such contractual relation—as where a municipality is allowed to recover against the owner of land for damages which it has been compelled to pay to one who has suffered personal injuries from a negligently kept sidewalk—it is obviously necessary to fall back upon the quasi contractual basis. See Washington Gas Light Co. v. District of Columbia (1896) 161 U. S. 316.

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1. See *ante* § 450.

2. And therefore the statute of limitations begins to run at that time; Davies v. Humphreys (1840) 6 M. & W. 153.

3. Fleetwood v. Charnock (1629) Nelson 10. Before this time it was necessary to take counter bonds. The jurisdiction is usually traced to the influence of the maxim that equality is equity; see *ante* § 25.

4. Cowell v. Edwards (1800) 3 B. & R. 268. The basis for relief at law is sometimes quasi contractual, sometimes contractual; see Woodward, Quasi Contracts, § 254. Since contribution is allowed between persons who are entire strangers to each other, it is obvious that in such cases relief can not be based upon contractual grounds.

5. At law he must sue each co-surety separately; Powell v. Mathis (1843) 26 N. C. 83.

6. Hitchman v. Stewart (1855) 3 Dewey 271. The result of this is that the burden of possible loss due to the insolvency or absence of some of the co-sureties is shared by all the other co-sureties equally with the plaintiff.

proportion fixed by the number of sureties who became liable.[7] In order to be entitled to contribution it is not necessary that the sureties should have signed the same instrument or should have known of each other;[8] and the better view and the tendency of the authorities is to allow contribution between joint tort feasors who are morally innocent.[9]

§ 453. Exoneration.

In order that a surety be entitled to subrogation, reimbursement or contribution, he must have paid either all or part of the debt.[1] If the surety has plenty of ready money with which to do this these remedies are ordinarily adequate;[2] but where he does not have the ready money and would suffer irreparable injury by being compelled to raise the amount by a sale or incumbrance of his own property, or by withdrawing it from his business, these remedies are not adequate and he is therefore[3] entitled in equity to a decree against the

7. Batard v. Hawes (1853) 2 Ellis & B. 287. This was at least partly due to the lack of elasticity in common law procedure; see *ante* § 5.

8. Deering v. Winchelsea (1787) 2 B. & P. 270; 4 Col. Law Rev. 432; the important thing is that they should be equally liable for the same burden, tho not necessarily for equal shares.

9. For example, where several parties under an honest mistake as to title levy upon property belonging apparently to their debtor; Acheson v. Miller (1853) 2 Ohio St. 203. See Woodward, Quasi Contracts §§ 255-257; 17 Harv. Law Rev. 345; 12 *id* 176-194; 21 *id.* 242, 243.

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1. See *ante* §§ 450-452.

2. Because he is entitled to recover costs, interest and attorney's fees against the principal debtor; Pierce v. Williams (1854) 23 L. J. Exch 322; Hare v. Grant (1877) 77 N. C. 203; and a proportionate share thereof against the co-sureties; Davis v. Emerson (1840) 17 Me. 64.

3. Whether the right is limited to cases where the other remedies are not adequate is not clear from the cases, but such inadequacy is frequently mentioned; Tankersley v. Anderson (1809) 4 Desaus. (S. C. Eq.) 47; Wolmerhausen v. Gulick (1893) 2 Ch. 414; "if a man were surety with nine others for £10,000 it might be a ruinous hardship if he were compelled to raise the whole £10,000 at once and per-

principal that he exonerate the plaintiff entirely from having to pay,[4] and to a decree against his co-sureties that they exonerate him except as to his own share.[5] The right arises as soon as the debt matures; the surety need not wait till he is sued.[6] But the enforcement of the right must not in any way hinder or embarrass the creditor; he may, notwithstanding the suit for exoneration by the surety, proceed to judgment and execution against him.[7] Hence realization upon the right is dependent upon the inaction of the creditor[8] against the surety.[9]

Tho the most satisfactory basis for the right is the inadequacy of other surety remedies, it has been placed on *quia timet* grounds;[10] and where there is an actual contract to exonerate it is properly based on specific performance of contracts.[11]

haps to pay interest on the £9,000 until he could recover the £9,000 by actions or debtor summonses against his co-sureties." Another advantage of a bill to exonerate is to clear up any doubt as to whether the plaintiff is surety or principal.

4. Dobie v. Fidelity & Casualty Co. (1897) 95 Wisc. 540, 70 N. W. 482. Apparently the right belongs to any one who occupies substantially the position of a surety; Medsker v. Parker (1880) 70 Ind. 509.

5. Wolmerhausen v. Gulick *supra*. In such a case the plaintiff must, of course, be ready to pay his share.

6. West v. Chasten (1818) 12 Fla. 315.

7. Roberts v. Amer. Bonding Co. (1899) 83 Ill. App. 464.

8. Tho in most of the cases the point is not raised it would seem that the creditor should be made a party in order that he may be at hand to receive the money and be bound by the decree, and thus avoid the possible peril to the principal of having to pay twice; the creditor would not, of course, be liable for any costs; see Moore v. Topliff (1883) 107 Ill. 241; 9 Mich. Law Rev. 237-239.

9. The decree of exoneration may be enforced against the property of the principal or co-sureties in the same way as any other money decree. As to enforcing such decrees in other jurisdictions see Bullock v. Bullock (1895) 57 N. J. Law 508, 31 Atl. 1024; 17 Mich. Law Rev. 527-552.

10. MacFie v. Kilauea Co. 6 Hawaiian 440; Tankersley v. Anderson, *supra*: "It would be hard on sureties if they were compelled to wait till judgment against them, or they paid the debt, before they could have recourse to their principal, who might waste his effects before their eyes."

11. See *ante* § 55.

§ 454. Marshalling.

If A, a creditor of D, has a mortgage or lien on two parcels of property, X and Y, and B has a subsequent mortgage or lien on Y only, it is obviously to B's advantage that A should, in enforcing payment of his claim, first exhaust X before resorting to Y; and since it is undesirable that the amount which B may realize from his security should depend upon A's whim in the matter, the equitable doctrine of marshalling provides that if A should first exhaust Y and there is still some or all of X left after A's full satisfaction, B is entitled to the assignment of A's mortgage or lien on X.[1] Whether the right arises at the time the subsequent incumbrance is made[2] or at the time that A begins foreclosure proceedings,[3] there is a square conflict of authority; and the whole doctrine has been criticised as unfair to the unsecured creditors.[4]

§ 455. Creditors' bills.

The term creditors' bill is applied to three different types[1] of bills for equitable relief: (1) A bill to enforce

1. Aldrich v. Cooper (1802) 8 Ves. 382, 394. It is to be carefully noted that the right is in substance one against the debtor and not against the other creditor; Detroit Bank v. Truesdail (1878) 38 Mich. 430, 439; 22 Harv. Law Rev. 447. Cf. exoneration § 453 Unfortunately the term "subrogation" is sometimes applied to the doctrine, but it is better to confine that term to the right of a surety. See *ante* § 450. This has led to some confusion; 14 Col. Law Rev. 453.

2. This seems to be the prevailing view in the United States; and it is therefore held that the right is enforcible against all except *bona fide* purchasers for value without notice and that later purchasers of X are bound by a registry of the two incumbrances; Robeson's Appeal (1887) 117 Pa. St. 628; 18 Harv. Law Rev. 453; 14 Col. Law Rev. 332.

3. This is the English view; hence if X has been later mortgaged to C before foreclosure proceedings, A's mortgage is paid ratably from X and Y; Barnes v. Racster (1842) 1 Y. & Coll. 401.

4. See 1 Harv. Law Rev. 69, 70.

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1. The term might also be aptly applied to a bill to enforce the marshalling of securities; see *ante* § 454; and to a bill by a creditor

a trust for the payment of creditors, equity jurisdiction being based upon the existence of a trust.[2] (2) A bill to set aside a conveyance in fraud of creditors, equity jurisdiction being based upon the fraud and the desire to get specific relief.[3] (3) A bill for equitable execution to reach assets of a debtor which common law execution is too clumsy to reach.[4] In order to be entitled to this relief he must usually show that he has exhausted[5] common law execution;[6] equity will thereupon command the debtor to assign to the creditor his legal and equitable choses in action and such other assets as are beyond the reach of the sheriff.[7]

§ 456. Equitable mortgages.

At early common law a mortgage was a conveyance of the legal title by A, the mortgagor, to B, the

to reach securities given by a principal debtor to a surety. The rule allowing the latter relief rests upon what now appears to have been a dictum in Maure v. Harrison (1692) 1 Eq. Cas. Abridg't 93; it has since been discredited in England; Royal Bank of Scotland v. Commercial Bank of Scotland (1882) 7 App. Cas. 366. Though it probably still represents the prevailing view in this country, it has been vigorously assailed as having no proper basis, there being no satisfactory grounds for declaring a constructive trust; 1 Col. Law Rev. 271; 13 *id.* 333, 359. Of course, if the debtor creates an actual trust for the creditor there is no reason why relief should not be granted.

2. See *supra;* also *ante* § 263.

3. See *ante* § 396. Though the conveyance is usually made by the debtor, relief will be given where an insolvent debtor has bought property and it has been conveyed at his direction to a third person to defraud creditors; Dewey v. Long (1853) 25 Vt. 564; 2 Col. Law Rev. 421.

4. See *ante* § 396; also §§ 115, 238, 315.

5. By showing that he has obtained a judgment, that he has had an execution levied thereon and that the levy has been returned *nulla bona.*

6. Or that to do so would obviously be futile and therefore a useless expense.

7. For example, patent rights; Pacific Bank v. Robinson (1881) 57 Cal. 520; 23 Harv. Law Rev. 150. Also contingent interests in land or chattels; Alexander v. McPeck (1904) 189 Mass. 34, 75 N. E. 88; 25 Harv. Law Rev. 171, 197.

mortgagee, subject to the condition that if, on a prescribed day, A should pay B a sum of money, the legal title should revest immediately in A. If A should allow the day to pass without payment or tender of the amount due, B's estate would become absolute and A's rights entirely forfeited. The harshness of this result in case of the slightest default caused equity to interfere, by giving to the debtor an equity of redemption,[1] and still later gave the creditor the remedy of foreclosure of the equity of redemption.[2] In many states in this country it is held that the mortgagee get only a legal lien, and hence the mortgagor's rights in those states are legal rather than merely equitable, tho the term "equity of redemption" may still be used.[3]

Where the conveyance to the mortgagee is defective so that he is compelled to come into equity to have the error corrected, such an attempted conveyance is usually called an equitable mortgage;[4] the term is also employed where the debtor has made a specifically enforcible contract to give security,[5] and where title deeds have been deposited by way of security, thus creating an equitable lien on the land.[6]

1. Equity courts —influenced by the maxim that equity regards substance rather than form—insisted that the substance of the transaction was that the mortgagee should be paid his debt with interest and hence he could not properly complain if the payment were not made exactly on the day set for payment. See *ante* § 19.

2. This was necessary in order to protect the mortgagee.

3. The subject of mortgages is too large to be treated in this book. See Jones on Mortgages. See also 4 Harv. Law Rev. 1-14, The Story of Mortgage Law, by H. W. Chaplin.

4. For example, if the name of the grantee is omitted from the instrument; Dulaney v. Willis (1898) 95 Va. 606, 29 S. E. 324; or where a seal has been omitted by mistake; Dunn v. Raley (1874) 58 Mo. 134; 12 Harv. Law Rev. 140. Relief in such cases may usually be rested upon specific performance of contracts or upon reformation of instruments; see *ante* §§ 51, 333-339, 360.

5. See *ante* § 51.

6. This is properly held only in those jurisdictions, like England, where the possession of title deeds is an important matter; Russel v. Russel (1783) 1 Bro. C. C. 269. In this country, where the possession of title deeds has been rendered of slight importance because of the

Where an absolute conveyance is made but upon an oral or written understanding that it is for the purpose of security, equity will hold such a conveyance to be in substance a mortgage;[7] in such a case the rights of the grantor are solely in equity and the transaction is occasionally called an equitable mortgage.

§ 457. Penalties and forfeitures.

Two important fields of early equity jurisdiction were the prevention of the forfeiture of the estate of a mortgagor who failed to pay on the day,[1] and the prevention of the enforcement of penalties in bonds.[2] At the present time common law courts have adopted this equitable principle and generally refuse to enforce such stipulations.[3] But in many cases relief must still be sought in equity, as in the case of covenants in leases providing for forfeitures,[4] and in the case of judgments obtained through fraud, mistake or accident.[5]

Altho it is often said[6] that equity will never enforce a forfeiture, a valid exception has been made where forfeitures are justly enforcible but the legal remedy[7]

registry system, the doctrine would seem to have no place; see 12 Harv. Law Rev. 509, discussing Parker v. Carolina Sav'gs B'k (1898) 53 S. C. 583, 31 S. E. 673.

7. See 4 Harv. Law Rev. 11, 12; see also *ante* § 291.

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1. See *ante* § 456.

2. It was quite common to provide for a penalty of double the amount of the debt; equity interfered upon the ground that substantial justice required only compensation to the obligee. See *ante* § 19.

3. If a stipulation is construed to be liquidated damages and not a penalty, common law courts will enforce it. As to whether a stipulation is in the nature of a penalty is a matter to be determined upon a consideration of all the circumstances; Jaquith v. Hudson (1858) 5 Mich. 123; 16 Harv. Law Rev. 304; 13 *id.* 60.

4. See 20 Harv. Law Rev. 640.

5. See 23 Harv. Law Rev. 484; 22 *id.* 600; 18 *id.* 395; 15 *id.* 410.

6. Livingston v. Tompkins (1820) 4 Johns Ch. 415.

7. That equity will not interfere to enjoin a just forfeiture, see Hill v. Barclay (1810) 16 Ves. 402; 20 Harv. Law Rev. 640.

is inadequate.[8] Where contracts for the sale of land expressly provide that time shall be of the essence of the contract equity courts have too often acquiesced in and indirectly enforced an unjust forfeiture of the vendee's interest by refusing specific performance after payment of a large proportion of the purchase money by the vendee.[9]

§ 458. Infants, idiots and lunatics.

The filing of a bill in equity relative to an infant's person or property makes the infant a ward of the court.[1] This jurisdiction seems to have grown out of the transfer by the Crown to the chancellor of the supervision theretofore exercised by the king as *parens patriae*,[2] and extends to the guardianship of his person, the supervision of his marriage[3] and to the control of his personal property and the income from his real estate.[4] Tho the jurisdiction is still important in England, the matter has been largely regulated by statute in this country and much of the jurisdiction given to courts of probate.

8. For example, where the lessee under a gas and oil lease defaults in developing the property so that very serious injury would result to the lessor; Gadbury v. Gas Co. (1903) 162 Ind. 9, 67 N. E. 259; 6 Col. Law Rev. 467. See also 7 *id.* 136, discussing Lindeke v. Ass'n Realty Co. (1906) 146 Fed. 630 (failure of lessee to erect buildings).

9. See *ante* § 151.

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1. Lloyd v. Kirkwood (1884) 112 Ill. 329.

2. Losey v. Stanley (1895) 147 N. Y. 560, 569, 42 N. E. 8. Chancery also protected married women by inventing the married woman's separate estate; see *ante* § 314.

3. Any interference with the ward's person or property, such as marrying him without the consent of the court is a criminal contempt of court; Butler v. Freeman (1756) Ambler 301. In *In re* H's Settlement (1909) 2 Ch. 260 the court imprisoned the ward himself for contempt for having married without its consent, but see criticism in 23 Harv. Law Rev. 222.

4. In some states the jurisdiction has been extended to the infant's estate in the land; King v. King (1905) 215 Ill. 100, 74 N. E. 89 (sale of land advantageous to infant); but not in England; Cal-

The power to determine whether an alleged idiot or lunatic was in fact such was exercised by the English Chancellor as representative of the king as *parens patriae* and never transferred to the court of chancery,[5] tho the supervision over the person and property of an adjudged idiot or lunatic seems to have been within the jurisdiction of the court.[6] In this country the matter everywhere is regulated by statute.[7]

§ 459. Ademption and satisfaction.

Where a testator after executing a will giving a legacy to X, to whom he stands in *loco parentis,* makes a gift during his lifetime to X, the gift is presumed to have been meant in ademption of the legacy;[1] the presumption may, however, be rebutted by showing a contrary intent, and no presumption arises if the legacy and the gift are not of the same kind of property.[2] Nor is there any presumption where the testator does not stand *in loco parentis* to X.[3]

vert v. Godfrey (1843) 6 Beav. 97. See also Rhea v. Shields (1904) 103 Va. 305, 49 S. E. 70, 23 Harv. Law Rev. 473.

5. *In re* Heli (1748) 3 Atk. 634. But equity courts will protect the property of an alleged lunatic, at the suit of a next friend, against fraud; Light v. Light (1858) 25 Beav. 248; 10 Harv. Law Rev. 249.

6. See 22 Cyc. 1120.

7. In Delaware, for example, jurisdiction over an alleged lunatic from the moment proceedings begin has been given by statute to the equity courts; *In re* Harris (1893) 7 Del. Ch. 42, 28 Atl. 329; 7 Harv. Law Rev. 496.

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1. Carmichael v. Lathrop (1896) 108 Mich. 473, 66 N. W. 350; 10 Harv. Law Rev. 52.

2. Bellasis v. Uthwatt (1737) 1 Atk. 426: "Land is not to be taken in satisfaction for money nor money for land."

3. See 20 Harv. Law Rev. 72; 11 *id.* 416. The doctrine of ademption originated in the dislike which courts felt for double portions and their assumption that a father intended to deal with all his children alike. It has been criticized as operating to the disadvantage of legitimate as compared with illegitimate children. See 10 Harv. Law Rev. 52. And see Roper on Legacies, Ch. VI.

Where a testator, being indebted to Y, gives him by will a legacy equal to or greater than the amount of the debt, the legacy is presumed to be meant in satisfaction of the debt;[4] the presumption may, however, be rebutted by showing an intent to the contrary.[5] The doctrine has not been popular with the courts and there has been a tendency to lay hold of any circumstance upon which to ground an exception.[6]

§ 460. Lis pendens.

One who acquires an interest in land involved in litigation takes subject to the final judgment or decree, even tho he pays value and has no notice of the suit.[1] The doctrine is frequently referred to as an equitable one based upon constructive trust and constructive notice,[2] but the better view is that it is founded upon the necessity of both equity and common law courts of keeping the subject of the litigation before the court and of preventing the frustration of the court's judgment or decree.[3] In case of negotiable paper not yet due, however, this judicial necessity yields to the social interest in favor of the free operations of commerce;[4] and there is square conflict of authority as to whether it applies to chattels,[5] and as to whether the courts of a

4. Fowler v. Fowler (1735) 3 P. Wms. 353. If the legacy is less than the debt there is no presumption of part satisfaction; Graham v. Graham (1749) 1 Ves. Sr. 263.

5. Haynes v. Mico (1781) 1 Bro. C. C. 131.

6. See 2 Williams, Executors pp. 609-615; Strong v. Williams (1815) 12 Mass. 391; see *ante* § 21, note 4.

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1. Murray v. Ballou (1815) 1 Johns Ch. 566.

2. Wortley v. Birkhead (1756) 2 Ves. Sr. 571.

3. Bellamy v. Sabine (1857) 1 De G. & J. 564; 7 Col. Law Rev. 282; 12 *id.* 82, 361; 20 Harv. Law Rev. 488; 22 *id.* 455; 16 *id.* 225.

4. Leitch v. Wells (1872) 48 N. Y. 585; 20 Harv. Law Rev. 488; 22 *id.* 455.

5. In England it does not apply to chattels personal; Wigram v. Buckley (1894) 3 Ch. 483; but the weight of authority in the U. S. is probably *contra*; see Reid v. Sheffy (1897) 75 Ill. App. 136; 16 Harv. Law Rev. 225; 12 Col. Law Rev. 361.

sister state are bound by the full faith and credit clause to give the doctrine extra-territorial effect.[6] Tho usually invoked by plaintiffs it applies also to protect defendants.[7]

6. That they are, see Fletcher v. Ferrel (1840) 9 Dana 372; *contra*, Shelton v. Johnson (1857) 4 Sneed 672.

7. Garth v. Ward (1741) 2 Atk. 174; 7 Col. Law Rev. 282.

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